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[redacted]

No. [redacted] 64

In the Supreme Court of the United States

October Term, 1958

Federal Trade Commission, petitioner

v.

Henry Broch and Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission, Washington 25, D.C.

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CITATIONS

In the Supreme Court of the United States

October Term, 1958

No. —

Federal Trade Commission, petitioner

v.

Henry Broch and Company

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment entered in the above case on December 11, 1958, by the United States Court of Appeals for the Seventh Circuit, setting aside a Commission order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 13–21) is reported at 261 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, pp. 22–23) was entered on December 11, 1958. The time for filing a petition for writ of certiorari was extended, by order of Mr. Justice Clark on March 2, 1959, to May 9, 1959 (Appendix C, *infra*,

p. 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2(c) of the Clayton Act, which makes it unlawful for "any person" to pay or grant brokerage, or any allowance in lieu thereof, to the other party to a purchase or sale transaction, applies to a seller's broker who pays or grants part of his ~~brokerage, or any allowance in lieu thereof, to the~~ brokerage commission to a buyer.

2. Whether, within the meaning of Section 2(c), a seller's broker pays part of his commission, or an allowance in lieu thereof, to a buyer when the broker's principal sells to a buyer at a reduced price which the seller had granted, as the broker knew, because of the broker's agreement to accept a reduced brokerage commission on sales to the favored buyer.

STATUTE INVOLVED

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the

> direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT

The Federal Trade Commission in its complaint (J.A. 1–5[1]) charged that respondent Henry Broch and Company, a partnership, while engaged in commerce as a broker or sales agent for seller principals, violated Section 2(c) by granting and allowing a portion of its brokerage fee to one large buyer in connection with that buyer's purchase of a food product (apple concentrate) in commerce from a particular seller principal.

Broch, in its answer (J.A. 5–11), admitted that it was engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the sale cited by the complaint was $1.30 per gallon; that this price was reduced to $1.25 by the seller in the instance cited; and that instead of being reimbursed by the seller at the previously agreed upon rate of 5%, it accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

After full administrative proceedings, the Commission held that Broch had violated Section 2(c) as charged and entered a cease and desist order (J.A. 195–197).

The facts are not in dispute. Broch was engaged by its seller principal under an agreement to sell apple concentrate at a 5% rate of brokerage commission (Appendix A, *infra*, pp. 14, 15). Broch sub-

[1] "J.A." refers to joint appendix in the Court of Appeals.

sequently agreed with its seller principal to accept only 3% brokerage on sales to a particular large purchaser in order that that purchaser might receive a price lower than that afforded any other (Appendix A, *infra* pp. 14, 17). The full established price was maintained on sales to all other customers, whether made through Broch or other brokers, and on all other sales Broch and all other brokers received their full agreed-to brokerage (J.A. 180–181). It was only on sales to the one favored customer, made through Broch, that the selling price and brokerage were reduced (J.A. 181).

The Commission found that Broch accepted a reduced brokerage "with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession" (J.A. 190) and that within "the matrix of the factual situation projected by the record" this "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two per cent of their commission to the buyer direct" (J.A. 203).[2] Accordingly, the Commission held that Broch "granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal * * * to * * * a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce" (J.A. 193).

[2] Arithmetic analysis reveals that Broch and the seller principal participated equally in the price concession granted the favored buyer. The sales to the favored buyer evidenced by the record amounted to $40,736.80 (J.A. 176). The customary brokerage fee of 5% to Broch on these sales would have been $2,036.84. The actual brokerage of 3% received by Broch on

The Court of Appeals for the Seventh Circuit set aside the Commission's order. Judge Schnackenberg's opinion for the court observed that the Commission's findings of fact were not questioned and that "our duty [is] to apply the law to the facts and to determine whether [the Commission's] process of legal reasoning when applied to the facts is correct" (Appendix A, *infra*, p. 14).

The court held that "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c)" (Appendix A, *infra*, p. 18). The court stated further that the Commission had "interested itself in a private grievance between rival brokers" and doubted "whether the public interest * * * can be said to be served by this proceeding against the seller's broker" (*id.*, *infra*, p. 19). The court said that while the Commission had relied upon its finding that Broch's acceptance of a reduced brokerage "constituted a payment of part of their commission to [the buyer], exactly as though Broch had paid 2% 'of their commission to the buyer direct,'" the facts merely showed that "because of Broch's agreement to reduce its commission, the seller was able to reduce its price", and the court concluded that Broch had not paid anything to the buyer either in substance or in fact (*id.*, *infra*, p. 20). The court also stated that the Commission's interpretation of § 2(c) would "promote price rigidity and uniformity

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these sales amounted to $1,222.11. The total reduction in brokerage $2,036.84 minus $1,222.11 then amounted to $814.73 which is exactly 50% of the total price reduction of $1,629.47 by the seller principal at $.05 per gallon on the total sales.

contrary to the national antitrust policy," and that prohibiting a price reduction the basis of which was a lower commission payment to the seller's broker would mean that, so far as sales price is concerned, a seller's "costs are frozen without regard for the welfare of the public" (*ibid.*).

REASONS FOR GRANTING THE WRIT

1. This is the first court case directly involving the question of the accountability of a seller's broker under § 2(c) of the Clayton Act. The holding by the court below that § 2(c) does not cover sellers' brokers presents an important and substantial question of Federal law warranting resolution by this Court.

The decision is important not only as an interpretation of § 2(c) but also because it opens the door to price discriminations, particularly in the field of food distribution.[3] The critical importance of the decision in the administration of the Act is shown by the fact that more than 90% of the Commission's complaints charging violation of § 2(c) involve the distribution of food and kindred products. The impact of the decision below upon the entire food distribution industry has already been recognized in the trade.[4]

The decision, by insulating sellers' brokers from accountability for their agreements with their principals to manipulate brokerage and to reflect such ma-

[3] According to the 1954 Census of Business, Vol. 3, pp. 1–9, in the grocery industry (food and kindred products) the volume of sales handled by agents and brokers was $7,621,093,000.

[4] See *Broch Case Opens Way For More Price Discriminations; Texas Food Merchant*, March 1959, at p. 10; also see *Food Field Reporter*, January 5, 1959, at p. 6.

nipulation in price to particular buyers, carves a large loophole in § 2(c). The objective of the Robinson-Patman Act, and of § 2(c) in particular, was to eliminate this type of preferential treatment. A mass buyer desiring an unwarranted price concession is solely interested in obtaining a preferential price and is not concerned with whether brokerage is passed on to him by the seller or by the seller's broker. The buyer's dealings may be solely with the broker, and he may not know that the lower price which he receives represents a passing on to him of part of the commission of the seller's broker. If the broker is not within the section, as the court below holds, the section would be, on such facts, entirely ineffectual.

2. § 2(c) makes it unlawful for "any person" to pay or grant brokerage to a buyer. This all-inclusive language does not permit an exception for seller's brokers. And the legislative history of the Robinson-Patman Act supports the view that the prohibition runs against all persons, including sellers' brokers. The Congressional intent was to eliminate preferential treatment of particular buyers, through the medium of payment of brokerage, by *any* person, giver or taker, whoever he might be.[5]

[5] See the remarks of Senator Logan, chairman of the Senate subcommittee considering amendment of Section 2 of the Clayton Act (80 Cong. Rec. 3115):

"Mr. George: What I wanted to get perfectly clear, if I could, was whether the same prohibitions relate to both the giver and the taker of a rebate in any form.

"Mr. Logan: The prohibition is against its being done at

Both the Third and Fourth Circuits have held that § 2(c) imposes liability upon brokers who represent sellers and pay brokerage to buyers. In *The Great Atlantic & Pacific Tea Co.* v. *FTC,* 106 F. 2d 667, 674 (C.A. 3), certiorari denied 308 U.S. 625, the court said:

> * * * The edge of the paragraph [§ 2(c)] cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. * * *

In *Oliver Bros., Inc.* v. *FTC,* 102 F. 2d 763, 770 (C.A. 4), the court said:

> And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer;* for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. * * * [Emphasis supplied.]

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all, and, of course, it would apply to the giver as well as to the taker, although there is no criminal penalty provided.

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"Mr. George: I beg the Senator's pardon for interrupting his presentation. I had the impression that the bill did impose penalties on the giver of a rebate, and I wanted to know whether it imposed like prohibitions, or penalties or whatever the bill provides, on the taker.

"Mr. Logan: The bill prohibits the act, and that prohibition would extend to all who are affected by it."

Inasmuch as § 2(c) constitutes a correlative prohibition against the payment and receipt of brokerage (*Great Atlantic & Pacific Tea* case, *supra*), the court below erred in failing to recognize that the cases in which a buyer's agent or broker has been held in violation of § 2(c) for receiving brokerage from the seller constitute a precedent for holding a seller's broker liable for giving brokerage to the other party.[8]

3. The court below held that Broch had not violated § 2(c) because it had not paid any part of its commission, either directly or indirectly, to the buyer. The court, in so holding, made a finding as to the facts in direct conflict with the Commission's factual finding. The Commission adopted the hearing examiner's findings as to the facts (J.A. 205), and the latter found (*id.*, 191–192):

> However, what is involved here is * * * a dropping of commission on sales to a single

[8] The court below, citing *FTC* v. *Klesner*, 280 U.S. 19, expressed doubt that the instant proceeding was in the public interest. The *Klesner* case was under the Federal Trade Commission Act, which authorizes the Commission to proceed against unfair methods of competition only if it appears to the Commission that a proceeding "would be to the interest of the public." But there is no such limitation on a proceeding under § 11 of the Clayton Act, 15 U.S.C. 21, to enforce § 2(c) of the Act. The distinction in this respect between a proceeding to enforce the Trade Commission Act and a proceeding to enforce § 2(c) of the Clayton Act is succinctly stated in *Webb-Crawford Co.* v. *FTC*, 109 F. 2d 268, 269 (C.A. 5), as follows: "The Congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them. The Trade Commission is not to enter on any enquiry about their evil effect, nor whether a proceeding would be in the public interest. Its duty is to enforce the prohibition." Cf. *Klor's, Inc.* v. *Broadway-Hale Stores*, decided April 6, 1959, slip op. p. 4, note 4.

> purchaser, combined with a reduction in price to that purchaser under circumstances where it is clear that the reduction in commission was a concomitant of, in fact was the quid pro quo for, the reduction in price. Respondents' acceptance of a lower commission, under such circumstances, is as much a payment of part of their commission to the purchaser as if respondents had directly paid 2 per cent of their commission to the purchaser.

The Commission in its opinion also said that the "only reasonable inference" to be drawn from the established facts is that drawn by the examiner, that Broch's acceptance of a reduced commission "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two per cent of their commission to the buyer direct" (*id.*, 203).

In a proceeding under § 11 of the Clayton Act, as in a proceeding under the Trade Commission Act, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission." *FTC* v. *Pacific States Trade Association*, 273 U.S. 52, 63. In consequence, a reviewing court in passing upon the question of whether a finding has evidentiary support is not authorized to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 73.

While error by a court in encroaching upon the Commission's fact-finding function may present a question which ordinarily does not in itself merit review

by this Court, the error here is intertwined with the court's construction of the statute. It likened Broch's agreement to reduce his commission, in order that his principal should give a particular buyer a lower price, as standing on the same footing as an agreement, for the same purpose "by seller's employees, its landlord or its advertising agency, to reduce their salaries, rent or fees" (Appendix A, *infra*, p. 20). But this view ignores the fact that Congress, recognizing that brokers are intermediaries between buyers and sellers and that this relationship had served as a cloak for concealed preferences and discriminations, enacted in § 2(c) a specific prohibition against passing on brokerage commissions to a buyer.

Likewise, the court at least implied that a seller's cost saving, attributable to a reduction by his broker in the commission to be paid him on sales to the favored buyer, constitutes a defense to the § 2(c) prohibition. To this extent the decision is in conflict with the decision of the Court of Appeals for the Third Circuit holding that the cost saving defense granted as to price discrimination by a proviso to § 2(a) may not be read into § 2(c). *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667, 676–677, certiorari denied 308 U.S. 625.

CONCLUSION

The decision below presents questions of large importance in the administration of Section 2(c) of the Clayton Act. The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.[7]

EARL W. KINTNER,
General Counsel,
JAMES E. CORKEY,
Assistant General Counsel,
Federal Trade Commission.

MAY 1959.

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[7] In appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

No. 12305 SEPTEMBER TERM, 1958 SEPTEMBER SESSION, 1958

HENRY BROCH AND COMPANY, A COPARTNERSHIP CONSISTING OF HENRY BROCH AND OSCAR ADLER, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

December 11, 1958

Before DUFFY, *Chief Judge*, and SCHNACKENBERG and HASTINGS, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Henry Broch and Oscar Adler, copartners trading as Henry Broch & Company, herein called petitioners or Broch, ask us to review the action of the Federal Trade Commission and set aside its cease and desist order of December 10, 1957, issued pursuant to a complaint charging petitioners with violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

The complaint charged, in substance, that petitioners, while engaged in commerce as a broker or sales agent for seller principals, violated § 2(c) by

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[1] § 2(c), 49 Stat. 1527, 15 U.S.C.A. § 13(c).

granting and allowing a portion of their normal and customary brokerage fee to a particular buyer in connection with that buyer's purchase of food products in commerce from a particular seller.

In their answer petitioners admitted that they were engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the sale cited by the complaint was 1.30 per gallon; that this price was reduced to 1.25 by the seller in the instance cited; and that, instead of being compensated by the seller at a previously agreed to rate of 5%, petitioners accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

Following hearings before an examiner and the filing of his initial decision, containing findings of fact, conclusion, and a cease and desist order, petitioners appealed to the Commission, which adopted the said findings, conclusion and order and entered the order now under attack.

In this court the examiner's findings of fact are not questioned.[2] The facts appearing therefrom are as follows:

Broch is a broker or sales representative for about 25 principals who sell food products, and negotiates an annual volume of sales approximately \$4,000,000 to \$5,000,000. Among these seller principals is Canada Foods, Ltd., (hereinafter referred to as Canada Foods) a Canadian processor of apple concentrate and similar products. Canada Foods was also represented in the United States by several other broker-

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[2] We are here confronted with our duty to apply the law to the facts and to determine whether respondent's process of legal reasoning when applied to the facts is correct. *Standard Oil Co. v. Federal Trade Commission*, 233 F. 2d 649, 651, affirmed 355 U.S. 396; *Atalanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365, 368.

age firms, including Tenser & Phipps, Poole & Company, and Cuylar. The sales involved in this case were made to the J. M. Smucker Company, Orville, Ohio (hereinafter referred to as Smucker), a manufacturer of apple butter and preserves.

During negotiations in April and May 1954, when petitioners agreed to act as broker for Canada Foods, their commission on sales was established at 5%. The brokers other than petitioners were appointed with the understanding that their rate of commission would be 4%. Petitioners received a higher rate of commission because they stocked merchandise in advance of sales.

On October 11, 1954, Canada Foods established its price on its 1954 pack of apple concentrate at $1.30 per gallon in 50-gallon steel drums, and it authorized its various brokers, including petitioners, to negotiate sales at that price.

The first attempt to sell the 1954 pack of Canada Foods' apple concentrate to Smucker was made, not by petitioners, but by Phipps (of Tenser & Phipps) who contacted Smucker on or about October 1, 1954, several weeks before petitioners first contacted that buyer. Upon receiving the quotation on October 11, 1954, Phipps advised Smucker of the $1.30 price set by Canada Foods.

At some time between October 15 and 18, 1954, Smucker told Phipps that it was interested in purchasing approximately 500 barrels of the concentrate, but at a price lower than $1.30. This counter-proposal was transmitted to Canada Foods by Phipps on or about October 18, 1954, and was discussed in person with Canada Foods' manager on October 19, 1954. Canada Foods' manager told Phipps that $1.30 was Canada Foods' best price and that if it were not for a subsidy on apples by the Canadian Government,

Canada Foods could not sell even at that low price. This decision of Canada Foods to hold to its established $1.30 price on the Smucker offer was immediately transmitted by Phipps to Smucker. On October 20, 1954, Phipps attempted to secure a 10-day option from Canada Foods for Smucker on 500 to 700 barrels of apple concentrate at the $1.30 price. Canada Foods replied by letter of October 25, 1954, refusing even to hold the $1.30 price for the period requested since, in its estimation, the price was liable to rise.

As late as October 26, 1954, Smucker specifically offered to purchase through Phipps 500 gallons of Canada Foods' concentrate at $1.25. Phipps wired the offer to Canada Foods that same day. On October 27, 1954, Canada Foods' manager telephoned Phipps, again stating that his lowest price was $1.30, and that the only way that the price could be lower would be if the brokerage was cut. Phipps relayed the information to Smucker, explaining that the order at $1.25 could not be confirmed since Phipps was afraid that this would constitute a violation of the Robinson-Patman Act.

A day or two before this last related event of October 27, 1954, Broch contacted Smucker in an effort to sell apple concentrate on behalf of Canada Foods. Smucker told Broch that it already had an offer from Canada Foods for $1.30 but that it would be interested in buying 500 drums at a lower price. With knowledge that Canada Foods, through another broker, was already negotiating to sell Smucker approximately 500 drums of concentrate and was holding to its $1.30 price, Broch called Canada Foods and stated it could make the sale if the price were $1.25 per gallon. Canada Foods took the proposition under advisement. On the following day, October 27, 1954,

the day Canada Foods told Phipps that the price could be reduced below $1.30 only if brokerage were cut, Canada Foods telephoned Broch and advised that it would make the sale at $1.25 per gallon provided Broch would agree to reduce its commission from 5% to 3%. Broch agreed and advised Smucker that Canada Foods would sell to it at $1.25 per gallon. The sale of 500 steel drums of apple concentrate at $1.25 per gallon was consummated, delivery made, and Broch received 3% brokerage rather than the usual 5%.

The order contained in the examiner's initial decision and adopted by respondent required Broch to cease and desist from "paying * * * Smucker, * * * any allowance or discount in lieu of brokerage * * * by selling * * * to such buyer at prices reflecting a reduction * * *, where * * * accompanied by a reduction in the regular rate of commission, brokerage * * * being paid to [petitioners] by such seller principal for brokerage service; * * *."

The examiner's conclusion, which was adopted by the Commission, is that petitioners "granted and allowed, and are now granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal, Canada Foods * * * to * * * Smucker * * *, a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce."

Before this court, counsel for respondent has specified the following language from §2(c)[3] as the basis for the order now being reviewed:

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[3] 15 U.S.C.A. § 13 (c), which reads:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof,

> That it shall be unlawful for any person engaged in commerce, * * * to pay or grant * * * anything of value as a commission, brokerage, * * * or any allowance or discount in lieu thereof, * * * either to [or from] the other party to such transaction * * *.

In so specifying, respondent's counsel stated that he was interpolating the words "or from" following the word "to" in the phrase "to the other party." Of course, we do not concede that counsel has a right to add words that Congress failed to use.

The order of December 10, 1957 cannot stand.

Neither the language of § (2)(c) nor its legislative history[4] indicates that a seller's broker is covered by § 2(c). Accordingly we hold that petitioner, as seller's broker, did not violate § 2(c). In arriving at this result, we have carefully considered *Oliver Bros., Inc.* v. *Federal Trade Commission,* 102 F. 2d 763, *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission,* 106 F. 2d 667, and *Quality Bakers of America* v. *Federal Trade Commission,* 114 F. 2d 393, principally relied on by respondent. Each of these cases involved *buyers'* purchasing agents who were charged with receiving brokerage commissions from the sellers, which they passed on to the buyers. This fact is emphasized in the *Great A. & P.* case, at 674, where the court said:

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except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[4] 80 Cong. Rec. 6281–82 (1936). See also 80 Cong. Rec. 3114, 7759–60 (1936); and Hearings Before the House of Representatives Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 37, 218, 258 (1935).

> * * * The question presented for our consideration is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors. * * *

In the case before us, no agent of the buyer is involved. Petitioner is an agent solely of the seller.

Respondent did not proceed against the buyer or the seller. Instead it interested itself in a private grievance between rival brokers, Tenser & Phipps and Broch. We doubt whether the public interest, which is involved in the Act, can be said to have been served by this proceeding against the seller's broker.

In *Federal Trade Comm.* v. *Klesner,* 280 U.S. 19, 28, the court said:

> * * * But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. * * *

The effect of respondent's order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal. This would be true even though the buyer does not suggest or even know of the reduction in the seller's brokerage commission, as in the case at bar.[5]

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[5] This was established by the testimony of purchasing agent Kiefer of Smucker.

Respondent relies heavily upon respondent's adoption of a finding by the examiner that the only reasonable inference possible is that Broch's acceptance of a reduced brokerage constituted a payment of part of their commission to Smucker, exactly as though Broch had paid 2% "of their commission to the buyer direct." However, even if the seller were enabled to reduce its price to Smucker, on an extraordinarily large order, because of an agreement by seller's employees, its landlord or its advertising agency, to reduce their salaries, rent or fees, it would not be the equivalent of a "direct" payment by the employees, the landlord or the advertising agency, to Smucker, the buyer. The most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker.

Respondent's interpretation of § 2(c) would actually promote price rigidity and uniformity contrary to the national antitrust policy. In *Federal Trade Commission* v. *Reed,* 243 F. 2d 308, cert. denied, 355 U.S. 823, we said, at 309:

> * * * the history, purpose and decisional law concerning the Clayton and Federal Trade Commission Acts demonstrates that they are in pari materia—to be read and construed as one in such manner as to best effectuate the purpose of Congress in enacting them. * * *

Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately

defray the resultant costs of distribution.[6] Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations. *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 248–250 (1951), 233 F. 2d 649 (7th Cir. 1956), aff'd, 355 U.S. 396 (1958).

For the foregoing reasons, the order of the Federal Trade Commission entered December 10, 1957, is set aside.

ORDER SET ASIDE.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[6] Cf. *Simplicity Pattern Co.* v. *Federal Trade Commission,* 258 F. 2d 673, 683. Cert. granted Nov. 24, 1958, — U.S. —.

APPENDIX B

United States Court of Appeals for the Seventh Circuit

No. 12305

Thursday, December 11, 1958

HENRY BROCH & COMPANY, ETC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before Hon. F. BRYAN DUFFY, *Chief Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge;* Hon. JOHN S. HASTINGS, *Circuit Judge.*

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission, and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order entered in this cause by the Federal Trade Commission on December 10, 1957 be, and the same is hereby, set aside, in accordance with the opinion of this Court filed this day.

United States Court of Appeals for the Seventh Circuit

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby

certify that the foregoing ---- pages contain a true copy of JOINT APPENDIX FILED AUGUST 4, 1959; OPINION FILED DECEMBER 11, 1958; JUDGMENT ENTERED DECEMBER 11, 1958, in

CAUSE NO. 12305

HENRY BROCH & COMPANY, A COPARTNERSHIP CONSISTING OF HENRY BROCH AND OSCAR ADLER

v.

FEDERAL TRADE COMMISSION

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of April A.D. 1959.

KENNETH J. CARRICK,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

Supreme Court of the United States

No. —, October Term, 1958

Federal Trade Commission, petitioner

v.

Henry Broch and Company

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9th, 1959.

/s/ Tom C. Clark,
Associate Justice of the Supreme Court of the United States.

Dated this 2 day of March 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959

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No. 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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June 9, 1959.

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CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 895

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

In view of the Court of Appeals' premise that the Federal Trade Commission's application of the Robinson-Patman Act in this case "would actually promote price rigidity and uniformity contrary to the national antitrust policy" (Pet. 20), it is significant that the Commission's petition for certiorari does not carry the conventional imprimatur of the Antitrust Division or the Justice Department. Instead, the Solicitor General advises that "In appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved" (Pet. 12 n. 7).

Questions Presented

Section 2(c) of the Robinson-Patman Act prohibits the payment of brokerage commissions by any person to the "other party" or his intermediary. In this case, the Court of Appeals unanimously set aside a ruling by the Federal Trade Commission that respondent, an independent food broker, violated Section 2(c) by accepting a smaller rate of commission from his seller principal who reduced his price to one buyer for an economical quantity of apple concentrate in a competitive situation. The Court of Appeals declined to adopt the Commission's unprecedented interpretation, never before tendered to a court in two decades of Robinson-Patman enforcement, and held that "neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (Pet. 20). The Court also declared that Section 2(c) did not cover an independent seller's broker, noting that respondent had functioned as "an agent solely of the seller" (Pet. 19).

Accordingly, the questions presented concern (1) the correctness of the Court of Appeals' holding under Section 2(c) that no payment of brokerage to the buyer was made by respondent's acceptance of a smaller commission from the seller;[1] and (2) the extent of statutory liability imposed by Section 2(c) on independent seller's brokers, in circumstances reflecting open price differentials governed expressly by the provisions of the Act as to discriminations in price.

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[1] If the Court of Appeals' holding on this aspect is correct, the other question becomes academic. Question 1 of the Petition, simply presuming that such a "payment" was made (Pet. 2), begs the issue here while acknowledging its existence by designating it as Question 2 (Pet. 2).

Statute Involved

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, are as follows—

Section 2(c), the so-called Brokerage Clause, declares:

> "It shall be unlawful for any person * * * to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 15 U.S.C. § 13(c).

The pertinent text of Sections 2(a) and (b), prohibiting injurious and unjustified price discriminations by sellers, declares:

> "It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such com-

modities are to such purchasers sold or delivered * * *. 15 U.S.C. § 13(a).

"* * * *Provided, however,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C. § 13(b).

Section 2(f), defining the liability of the recipient of price discriminations, provides:

"It shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

Statement

This controversy originated in a contest between two rival brokers for a sale of apple concentrate to a food processor in Ohio, which culminated in a Federal Trade Commission proceeding against respondent who closed the deal which his competitor lost.

Respondent, a Chicago partnership functioning as an independent sales representative on behalf of about twenty-five sellers of food products, in early 1954 began to represent Canada Foods, a Nova Scotia apple producer, at an anticipated 5 per cent commission basis. Canada Foods also designated three other sales representatives in the United States, including Tenser & Phipps, a broker in Pittsburgh, Pennsylvania.

In early October of 1954, Canada Foods instructed respondent, as well as Tenser & Phipps, to sell the 1954 pack of apple concentrate at $1.30 per gallon in

fifty-gallon steel drums (J.A. 104, 109).[2] In negotiations carried on independently both with respondent and Tenser & Phipps, the Smucker Company, a prospective buyer, bid only $1.25 per gallon for 500 drums, an unusually large lot permitting savings in preparation, packaging and freight (J.A. 127-130), and suggested that similar concentrate was available at lower prices from competing sources (J.A. 31, 75-76, 132-135).

Respondent telephoned the details of the Smucker offer to the manager of Canada Foods, who said he would "sharpen my pencil, and let you know" (J.A. 76, 132-133). The next day Canada Foods' manager called back to accept the buyer's bid of $1.25 per gallon, but informed respondent that "You are going to receive three per cent brokerage" (J.A. 77, 18-19, 133). As Canada Foods' manager viewed the sale, he gave respondent "permission to sell on these conditions" (J.A. 133). Respondent objected but "he cut me off pretty fast," and saw that nothing would be gained by protesting further except loss of the sale (J.A. 77). The arrangement was nevertheless profitable for respondent because its expenses in negotiating this unusually large order were much smaller than if 500 drums of apple concentrate were sold piecemeal in the usual quantities of 50 to 100 drums to many buyers (J.A. 77).

In the meantime, respondent's rival, Tenser & Phipps, had advised Smucker, the buyer, that "We could confirm the order at the price of $1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find

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[2] References are to pages of the joint appendix in the Court of Appeals.

our names in print. It would be a feather in somebody's cap to decorate us with the violation * * *" (J.A. 117-118).[3]

While instituting no action against either the seller or the buyer, the Commission on January 11, 1956 issued a complaint charging respondent with violating Section 2(*c*). Respondent's rival Phipps appeared as chief witness in support of the complaint. The hearings did not substantiate the complaint's allegations that respondent "requested" the seller to lower its established price to the buyer and "to recoup part of such loss" by reducing respondent's customary commission (J.A. 3).

Instead, the Commission's ruling deemed it sufficient that "by acquiescence, ratification, confirmation, agreement, *or otherwise*" respondent received a reduction in brokerage rather than lose this large sale (J.A. 203). The Commission theorized that in negotiating the sale to Smucker respondent made "a payment of part of their commission to the buyer" via respondent's acceptance of the smaller commission at the same time as the seller gave a lower price to the buyer—"exactly as though [respondent] had paid two per cent of their commission to the buyer direct" (J.A. 203).[4] In reaching this interpretation of Section 2(*c*),

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[3] Phipps later explained about being "found out by any member of the National Brokerage Association that wanted to have a gripe" (J.A. 42).

[4] The Commission's "[a]rithmetic analysis," said to reveal a 50-50 sharing of the price reduction (Pet. 4 n. 2), is sheer legerdemain. The FTC's own exhibit shows respondent's hypothetical "loss" as 2.75 cents a gallon, whereas the buyer secured a 5 cent price reduction (Com. Ex. 18—not printed). The complaint charged that the seller recouped "60 percent" of respondent's customary commission (J.A. 3); the Commission exhibit is down to 55%; and counsel now claim 50%. *All* are equally discredited by the Commission's failure to prove its charges in the complaint.

the Commission regarded it "unnecessary to resort to the reports of Congress to ascertain what was intended," for after "[r]eflection upon the climate which produced the Clayton Act" it concluded that "the matrix of the factual situation projected by the record" placed respondent in violation of Section 2(c) (J.A. 201, 203).

Commission counsel acknowledged below that Section 2(c) would not be a proper vehicle for pursuing a "price reduction openly made coincident with a reduction in the broker's commission," for "[i]f this case involved simply a price reduction it would have been a matter properly cognizable under 2(a)" (FTC Br. 16, 25). Notwithstanding the prohibitions of the Commission's order precisely on such price reductions,[5] counsel urged that additional factors supported a conclusion that respondent did grant a payment to the buyer.

The Court of Appeals rejected the Commission's theory and unanimously reversed. In the Court's opinion, "[t]he most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (Pet. 20).

In addition, the Court declared that "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that petitioner, as seller's broker, did

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[5] The Commission's order flatly prohibited respondent from selling to any buyer "at prices reflecting a reduction" from the seller's previous prices, "where such reduction in price is accompanied by a reduction in the [broker's] regular rate of commission" (J.A. 195).

not violate § 2(c)" (Pet. 18). In this connection, the Court stressed that respondent was "an agent solely of the seller," and not a buyer's dummy for funneling back illicit payments to his employer (Pet. 19).

The Court of Appeals also remarked that the Commission, rather than proceeding against the buyer or the seller under the applicable statutory provisions, had ignored the public interest by meddling with "a private grievance between rival brokers" (Pet. 19).

Above all, the Court feared that the Commission's unwarranted interpretation of Section 2(c) "would actually promote price rigidity and uniformity contrary to the national antitrust policy" (Pet. 20). For

> "Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations" (Pet. 20-21).

ARGUMENT

As will be detailed, the decision below properly parses Section 2(c), the so-called Brokerage Clause, in harmony with the design of the framers and this Court's admonitions to "reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress."[6]

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[6] *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 74 (1953).

The ruling below does not foster price discriminations, but rather requires the Commission to invoke the pertinent statutory remedies in Sections 2(a) and (f) against the grant or receipt of discriminatory prices, instead of resorting to Section 2(c) as an unauthorized shortcut permitting the exclusion of cost and competitive factors which can "justify" a price differential under the applicable provisions. Moreover, the opinion below concerns a petty mercantile grievance in a "sporting" case, and creates no pregnant legal doctrine or genuine conflict of decision meriting the dignity of Supreme Court review.

I. *The Decision Below Accurately Interprets Section 2(c) in Light of the Congressional Design to Force Price Differentials Into the Open for Adjudication Under the Price Discrimination Provisions.*

The Court of Appeals recognized and effectuated the Congressional plan to establish Section 2(c), the so-called Brokerage Clause, as an auxiliary to the central statutory prohibitions on the grant or receipt of price discriminations.

In the legislative design of the Clayton Act, before and after its amendment by the Robinson-Patman Act, the key prohibition outlaws price discriminations which are detrimental to competition and cannot be "justified" by cost or competitive considerations. To nip evasion of the main prohibition by devices to conceal discriminations in price, Congress enacted several auxiliary provisions. Thus, as explained by Senator Logan at the time of the Robinson-Patman amendments in 1936,

> "In order to evade the provisions of the Clayton Act, however, it was found that while direct price

> discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about." 80 Cong. Rec. 6281-82 (1936).

Accordingly, Section 2(c) was incorporated in the omnibus revision of the statute as a ban on the payment as well as the receipt of such "bogus" brokerage payments which disguised price discriminations to devious buyers. Its purpose was to "force price discriminations out into the open." *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 692 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938). Confronted with an "absolute" proscription in Section 2(c), "sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings." *Federal Trade Commission* v. *Simplicity Pattern Co.*, No. 406, O.T. 1958, pp. 10, 13 (June 8, 1959).

Both the text and conception of Section 2(c) preclude the FTC's strained application which the Court of Appeals correctly rejected in the instant case. For here the seller's price reduction to the buyer was "open" and obvious from the face of the invoice, and

was directly amenable to the governing provisions of Sections 2(a) and (f) pertaining to alleged price discriminations, subject to "justification" by cost and competitive factors.[7] The open price reduction at issue could thus hardly be deemed a payment of those "false brokerage allowances" or "secret" discriminations specified by the Court's *Simplicity Pattern* opinion (pp. 13 n. 12, 15) as "banned outright" under Section 2(c)—let alone be viewed *as a payment on the part of the broker* who acquiesced in a smaller commission when the seller openly lowered his price.

In this context, moreover, the Court of Appeals accurately held that Section 2(c) imposes no liabilities on an independent seller's broker. The statutory prohibition on brokerage payments by "any person" to the "*other* party" or his intermediary, read both literally and in the perspective of the Congressional purpose, refers to discriminatory concessions by a seller to buyers or the buyer's agents who act as conduits for receiving and concealing forbidden payments. As analyzed in the Report of the House Judiciary Committee, Section 2(c)'s ban on false brokerage payments "prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to

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[7] It was conceded that respondent "introduced evidence that the reduction in price responded to cost savings or to meet competition" (FTC Brief before Court of Appeals, p. 25 n. 13). This showing was held immaterial to a Section 2(c) charge by the Commission (J.A. 204), which failed to recognize that the open price differential here was properly cognizable under Sections 2(a) and (f).

the direct or indirect control, of the other."[8] Indeed, the phrase "any person," which throughout the Robinson-Patman Act refers only to seller and buyer parties in commercial transactions, is still further qualified in Section 2(c) by the specification of "*other*" parties[9]—thereby highlighting the absence of any purpose to penalize the independent seller's broker who inherently cannot function as a "party" to the sale.

In sum, the decision of the Court of Appeals implements and respects the statutory text and purpose. While the interpretations of Section 2(c) in the two decades of the Robinson-Patman Act have consistently carried out the legislative purpose to expose "secret" or concealed payments by one party to the other, whether directly to the buyer[10] or indirectly to his agent or dummy,[11] not a single judicial decision to date

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[8] H.R. Rep. 2287, 74th Cong., 2d Sess. 15 (1936). In Senator Logan's words, Section 2(c) meant that "no buyer shall engage in this trick brokerage practice whereby a rebate may be made by the seller." 80 Cong. Rec. 6282 (1936). Nothing more than equal liability for both grantor and recipient of a forbidden brokerage payment *as specified in the statute* is suggested in the Logan-George colloquy quoted by the Commission (Pet. 7 n. 5).

[9] Thus, the term "person" rather than a more descriptive noun introduces Sections 2(a), 2(c), and 2(f) as well, and in each instance refers only to the buying and selling parties in a commercial transaction. Contrariwise, when Congress wished to extend liability beyond the immediate buyer-seller parties, it utilized more embracing terminology. For example, Section 3, the criminal provision of the Robinson-Patman Act, reaches any "person" who is "a party to" or may "assist in" an illegal transaction. 15 U.S.C. § 13a.

[10] *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

[11] *E.g., Independent Grocers Alliance Distributing Co.* v. *Federal Trade Commission*, 203 F. 2d 941 (7th Cir. 1953); *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945); *Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945).

sanctions the Commission's upside-down theory of inflicting liability on the broker representing the seller who openly quotes a lower price.[12]

II. *The Decision Below Fosters No Price Discriminations, But Rather Reconciles the Robinson-Patman Act With Overall Antitrust Policies.*

The decision of the Court of Appeals provides no sanctuary for price discriminations, but rather achieves an essential reconciliation of Section 2(c) with antitrust objectives.

The plain provisions of the Robinson-Patman Act foreclose the Commission's undocumented assertion that the decision below "opens the door to price discriminations" (Pet. 6).[13] The ruling at bar confines itself to Section 2(c), the so-called Brokerage Clause, and does not touch Sections 2(a) and (f), the prime weapons in the Commission's arsenal to combat illicit price discrimination. To be sure, those provisions preserve some pricing flexibility for a competitive economy by permitting the "justification" of price differentials by reference to cost economies or the meeting of competition—factors which the respondent tendered but the Commission swept from consideration

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[12] The Commission's ruling significantly shunned the legislative reports, and instead felt that the "climate which produced" the Robinson-Patman Act made the obscure text of Section 2(c) "so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended" (J.A. 201). Actually, the House Report expressed a specific concern to protect independent seller's brokers, for "the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936).

[13] The Commission's professed fears are bare of substantiation by legal analysis or citations, and rely on such authorities as the *Texas Food Merchant* and the *Food Field Reporter* (Pet. 6 n. 4).

here (J.A. 204). But the availability of legal justifications guaranteed by statute in price discrimination cases provides no warrant for a strained resort to a more seductive but inapplicable provision which simplifies the prosecution's case and cuts off the rights of the respondent.[14]

Instead, the decision below wisely averts collision between the Robinson-Patman Act and antitrust policy. Under the Commission's instant application of Section 2(c), which demands no proof of competitive effects and permits none of the statutory justifications, a violation occurs whenever goods are sold "at prices reflecting a reduction from [current] prices" "where such reduction in price is accompanied by a reduction in the [broker's] regular rate of commission" (J.A. 195). The inevitable tendency of such a doctrine is to chill price bargaining and freeze brokerage commissions at artificially high levels.[15] And

[14] As trenchantly observed by the former Chief Economist of the FTC, "The predominance of brokerage cases is probably due partly to the zeal of the National Association of Food Brokers in bringing violations of this section of the act to the commission's attention and partly to the comparative simplicity of a proceeding under this section of the statute. Since violation consists merely in payment of brokerage or an equivalent to a party on the other side of the transaction or to his representative, the commission need only prove a relatively simple fact in order to establish its case. There is no need to consider competitive injury, cost justification, or action in good faith to meet the equally low price of a competitor." Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. Bus. U. of Chi. 149, 151-152 (1956). Indeed, respondent's rival Phipps in identifying the "feather in somebody's cap" talked about being "found out by any member of the National Brokerage Association that wanted to have a gripe" (J.A. 42).

[15] Perhaps this animates the "zeal of the National Association of Food Brokers" discussed by Dr. Edwards. That organization was recently enjoined from restrictive practices aborting competition among its members. *National Food Brokers' Ass'n*, F. T. C. Dkt. No. 6363 (1955).

when an important element in the cost of food distribution is immunized from the pressures of competition, the consumer's food bill in the end must pay the freight. Indeed, comparable efforts to "stabilize" brokerage commissions in other areas of the economy have been rigorously pursued as illegal restraints of trade under the Sherman Act[16]—as doubtless perceived by the Antitrust Division of the Department of Justice when it did not endorse the Federal Trade Commission's petition for certiorari.

By preventing such an enforcement anomaly, the Court of Appeals faithfully implemented this Court's mandate to "reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 74 (1953). There this Court denounced a strained interpretation of Section 2(f) which could "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation," and refused to construe the Act's "ambiguous language as putting the buyer at his peril whenever he engages in price bargaining." *Id.* at 63, 73. This Court stressed that "[t]ime and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes." *Id.* at 72 n. 11.

Here the Court of Appeals declined to sanction an application of Section 2(c) which "would actually

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[16] *E.g., United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950); *United States* v. *American Association of Advertising Agencies,* 1956 CCH Trade Cases, par. 68,252 (S.D.N.Y. 1956); cf. *Sugar Institute* v. *United States,* 297 U.S. 553, 587-88 (1936).

promote price rigidity and uniformity contrary to the national antitrust policy" (Pet. 20). For as the Court recognized, "[i]f a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position, as distinguished from comparable situations" (Pet. 20-21).

III. *The Decision Below Concerns a "Sporting" Case Devoid of Public Significance or Doctrinal Conflict.*

As pointed out by the Court of Appeals, this case was conceived in a petty mercantile grievance and reflects an essentially private rather than public controversy. The record belabors a haggle of de minimis dimensions, and is redolent with the personal pique of Mr. Phipps who muffed the apple concentrate deal which respondent closed. In effect, the Commission's processes here advanced a commercial vendetta rather than the public interest in a competitive economy and lower prices.[17]

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[17] There is no merit to the Commission's intimation (Pet. 9 n. 6) that the "public interest" is not a relevant factor in Robinson-Patman cases, for numerous discrimination proceedings have been dismissed by the FTC itself for lack of "public interest" in their prosecution. *E.g., Bohn Aluminum & Brass Corp.*, F. T. C. Dkt. No. 5720 (1955); *Argus Cameras, Inc.*, 51 F. T. C. 405, 409 (1954); *B. F. Goodrich Co.*, 50 F. T. C. 622, 623 (1954); *Wildroot Co.*, 49 F. T. C. 1578, 1581-82 (1953).

Furthermore, the refusal of the Court of Appeals to accept the FTC's odd twist of Section 2(c), never before tendered to a court in two decades of Robinson-Patman enforcement, merely contains the Commission within conventional and long-established boundaries for coping with alleged price discriminations. Only the antitrust paradox of the Commission's abortive theory retrieves this case from oblivion.

Nor is there any conflict of decision deserving resolution by this Court. The Commission's statement that two circuits "have held that § 2(c) imposes liability" upon independent seller's brokers (Pet. 8) is not only specious, but is belied by the Commission's simultaneous claim that "[t]his is the first court case directly involving the question of the accountability of the seller's broker under § 2(c) of the Clayton Act" (Pet. 6). Equally baseless is the further suggestion of conflict in the assertion that the court below "at least implied" the availability of statutory cost justification in a Section 2(c) proceeding (Pet. 11). This alleged implication, nowhere referenced to the text of the opinion below, defies detection in the words used by the Court of Appeals. The Supreme Court traditionally sits to review conflicting decisions, not unidentified and unidentifiable "implications."

CONCLUSION

The unanimous decision below correctly parses the perplexing text of the Robinson-Patman Act and fosters competitive pricing in harmony with the antitrust laws. At the core of this case is a petty brokers' bicker which generates no significant public controversy deserving of Supreme Court review. Accord-

ingly, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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June 9, 1959.

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MOTION FILED SEP 30 1959

IN THE

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OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

HENRY BROCH AND COMPANY, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF

HENRY J. BISON, JR.
1317 F Street, N. W.
Washington 4, D. C.
Attorney for Movant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 61

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

HENRY BROCH AND COMPANY, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The above association, pursuant to Rule 42 of the Rules of this Court, respectfully moves for leave to file the brief *amicus curiae* annexed hereto. Consent to the filing of a brief has been refused by the respondent.

Movant is a non-profit membership trade association, founded in Chicago, Illinois in 1893, and incorporated on October 9, 1916 under the law of the District of Columbia, with its principal office and place of business located at 360 North Michigan Avenue, Chicago, Illinois.

It is a federation of over 300 state and local associations of food retailers, and has approximately 40,000 members, including super market operators. Some 47 per cent of its member retailers live in towns with less than 25,000 population. About 25 per cent live in cities over 250,000 population. Members buy their merchandise through every available

means. Forty-one per cent are affiliated with cooperative buying organizations. Those affiliated with voluntary buying groups sponsored by wholesalers represent 39 per cent. The remaining 20 per cent have no affiliation with buying groups. The average annual sales volume per member store is approximately $329,000.

Diversion of brokerage to favored large buyers places independent retailers at a substantial competitive disadvantage. It was the practice of large food distributors to use their mass purchasing power to coerce diversion of brokerage to themselves which led to the enactment of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. That power has increased substantially in the last decade.

The decision below removing food brokers like respondent herein from the prohibition of Section 2(c) will have the practical effect of permitting the return of diversion of brokerage to large favored distributors placing independent distributors at a substantial competitive disadvantag and weakening the competitive system in food distribution.

Since independent retailers are the primary victims of such discrimination, movant has knowledge of, and experience with, the practical effects of the decision below. Movant believes the parties to this cause will not adequately present such facts, and offers the annexed brief to contribute to the Court's consideration of the issue on this appeal.

Respectfully submitted,

HENRY J. BISON, JR.
1317 F Street, N. W.
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Attorney for Movant

September 30, 1959

IN THE

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Federal Trade Commission, *Petitioner*,

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Henry Broch and Company, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES, AS AMICUS CURIAE

ARGUMENT

IN PRACTICAL EFFECT THE DECISION BELOW OPENS THE WAY FOR LARGE FOOD DISTRIBUTORS EMPLOYING THEIR ENORMOUS PURCHASING POWER TO EXACT DISCRIMINATORY CONCESSIONS FROM SUPPLIERS

The lengthy chain-store investigation conducted in the 1930's by the Federal Trade Commission disclosed that one of the most prevalent modes of oppressive discriminations in food distribution was the diversion of brokerage to favored buyers.

In its final report of the chain-store investigation, filed with Congress in 1934, the Federal Trade Commission stated:

"There were interviews with 129 manufacturers in the grocery group, 76 of which admitted that preferential treatment in some form was given. Thirty-three of the manufacturers interviewed stated positively that threats and coercion had been used by chain store companies to obtain preferential treatment. * * *

"In 23 of the 33 instances, threats and coercive measures were employed and resulted in securing the concession demanded. * * *

"Of the 23 instances in which manufacturers in this group stated they acceded to the demands of chains, 15 were demands for brokerage, 1 for freight allowance, 2 for lower prices and 5 were for other concessions. Those who granted brokerage, because of demands therefore, stated they acceded in order to obtain business."[1]

The Senate and House Judiciary Committee reports on the Robinson-Patman Bill called attention to the matter in these words:

"Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made."[2]

Accordingly, in Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act,[3] Congress pro-

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[1] Final Report of the Chain-Store Investigation S. Doc. No. 4, 74th Cong. 1st Sess. 24-25 (1934).

[2] S. Rep. No. 1502, 74th Cong. 2d Sess. 7 (1936); H. Rep. No. 2287, 74th Cong. 2d Sess. 15 (1936). See also Hearings Before Subcommittee of the Committee On the Judiciary on S. 4171, 74th Cong. 2d Sess. (1936), and Hearings Before Committee on The Judiciary on H. R. 8442, H. R. 4995, H. R. 5062, 74th Cong. 1st Sess. (1935).

[3] 49 Stat. 1526 (1936), 15 U.S.C. 13 (1958).

hibited any diversion of any kind of any sales compensation by any person to any buyer or any representative of any buyer. However, the Committee Report emphasized that the seller has the choice of using its own selling department (i.e. employee salesmen), or independent brokers, to do its selling and to pay them sales compensation for their services. Thus:

> "* * * Which method is chosen depends presumptively upon which is found more economical in the particular case; but *whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped.* It is for this reason that, when free of the coercive influence of mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since *such sales must bear instead their appropriate share of the seller's own selling cost.*"[4] (Italics added).

Diversion of brokerage to a few large buyers simply means that independent food retailers who are thereby discriminated against, bear most, if not all, of the seller's selling cost, the sales to large favored buyers bearing little or none of that cost. In any event, the discrimination is quite clear.

> "The petitioner points out that the sellers were saved traveling expenses, salesmen's salaries and commissions, telephone and telegraph charges, the expense of correspondence with brokers and salesmen. Therefore, says the petitioner, the prices paid by it were not discriminatory, since reductions in price were paid for by valuable services. *Inherent in these very arguments which the petitioner makes is the inescapable conclusion that the sums 'saved' to the sellers allegedly because they were not compelled to pay brokers, were not saved to them at all, but were merely translated into*

[4] H. Rep. No. 2287, 74th Cong. 2d Sess. 15 (1936).

another form to the financial benefit of the petitioner."[5] (Italics added)

The Federal Trade Commission recently reported to Congress on an investigation and study of integration and concentration of economic power at the retail level of distribution in the food industry.[6] In an interim report submitted to Congress on June 30, 1959, the Commission shows that chain food retailers with 11 or more stores had a sales increase of 117.9% from 1948 to 1958, whereas smaller operators increased their sales by 58% for the same period.[7]

The relative purchasing power of food chains has also been increased by a substantial number of merger acquisitions. The Commission's Interim Report shows that from 1949 through 1958, a total of 2238 food stores, with total annual sales at the time of acquisition of $1,916,452,000.00 were taken over in 315 horizontal acquisitions by food chains.[8]

Ten of the most active chains in the merger movement acquired 1474 stores in 107 transactions from 1949 through 1958. The total annual sales of these stores when acquired was $1,201,104,000.00.[9]

The diversion of brokerage to large favored buyers, in the manner of the case at bar, will lead to discriminations causing severe competitive injury to independ-

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[5] *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission* 106 F. 2d 667, 672 (1939) cert. denied, 308 U.S. 625 (1940).

[6] Federal Trade Commission Economic Inquiry Into Food Marketing Interim Report, June 30, 1959. See Commission's resolution dated October 9, 1958.

[7] Id. Chains, Table 2.

[8] Id. Chains, Table 6.

[9] Id. Chains, Table 6a.

ent food retailers even when the unfair advantage given to their large competitors amounts to a small percent.

> "It is clear from this record that retail distributors of food products in the United States are engaged in a close contest. Profit margins are slight. The difference between profitable operation and loss is fractional in character; between success and failure, astonishingly small. There is constant incessant struggle for advantages. In such a situation, where margins between profit and loss are so small, any dealer engaged in the contest, having secured an unfair advantage over his competitors, however small it may be, will be likely to upset or reverse a small percentage of profit in his competitor and convert it into a loss. When the net profit is in the neighborhood of 2%, an advantage of 5% in buying in one dealer immediately places him in an overpowering position so far as his competitors are concerned."[10]

In the case at bar, the respondent agreed to take reduced brokerage and knowing and intending that its principal, the seller would grant the amount of brokerage reduction as a part of a discriminatory discount in price to a favored buyer.[11] Respondent's agreement to take the reduced brokerage was the indispensable element of the discrimination received by the favored buyer in question. The fact that the brokerage diversion by respondent to the buyer "was not direct," but "was more subtle does not change its purpose or

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[10] *United States* v. *New York Great Atlantic & Pacific Tea Company* 67 F. Supp. 626, 677 (1946), aff'd 173 F. 2d 79 (CA 7th 1949).

[11] R. 19, 25, 91.

effect.'"[12] Section 2(c) "equally condemns" the "tendency and general results."'[13]

CONCLUSION

The decision of the Court of Appeals should be reversed and the order of the Federal Trade Commission reinstated.

Respectfully submitted,

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September 30, 1959

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[12] Cf. *Modern Marketing Service* v. *Federal Trade Commission* 149 F. 2d 970, 978-979 (CA 7th, 1945).

[13] *Webb-Crawford Co.* v. *Federal Trade Commission* 109 F. 2d 268, 270 (CA 5th, 1940), cert. denied, 310 U.S. 638 (1940).

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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINION BELOW

The opinion of the Court of Appeals (R. 218–224) is reported at 261 F. 2d 725.

JURISDICTION

The judgment of the Court of Appeals (R. 225) was entered on December 11, 1958. The time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark on March 2, 1959, to May 9, 1959 (R. 226). The petition for a writ of certiorari was filed on May 6, 1959, and was granted on June 15, 1959 (R. 226). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2(c) of the Clayton Act, which makes it unlawful for "any person" to pay or grant brokerage, or any allowance in lieu thereof, to the other party to a purchase or sale transaction, applies to a seller's broker who grants or allows part of his brokerage commission to a buyer.

2. Whether within the meaning of Section 2(c), a seller's broker grants part of his commission, or an allowance in lieu thereof, to the buyer, when he accepts a lower commission on sales to a particular buyer in order to enable the latter to obtain a discriminatorily lower price from the seller.

STATUTE INVOLVED

Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT

The Federal Trade Commission charged in its complaint (R. 2–5) that respondent Henry Broch and Company ("Broch"), a partnership, while engaged in commerce as a broker or sales agent for seller principals, violated Section 2(c) of the Clayton Act by granting and allowing a portion of its brokerage fee to one large buyer in connection with that buyer's purchase of a food product (apple concentrate) in commerce from a particular seller.

In its answer (R. 6–10), Broch admitted that it was engaged in commerce as a broker or sales representative of seller principals; that the then current price of the commodity involved in the saie cited by the complaint was \$1.30 per gallon; that this price was reduced to \$1.25 by the seller in the instance cited; and that instead of being reimbursed by the seller at a previously agreed-upon rate of 5%, it accepted a 3% brokerage payment on that sale. All other allegations of the complaint were denied.

After hearings, the examiner filed an initial decision concluding that Broch had violated Section 2(c) as charged, and proposed a cease-and-desist order (R. 173–202). Broch appealed to the Commission which, after receiving briefs and hearing oral argument, denied the appeal and adopted the examiner's findings as to the facts, conclusion and order as "the decision of the Commission" (R. 211).

The basic facts, as found by the examiner and supplemented by uncontradicted evidence in the record, are not in dispute.

Broch is a broker or sales representative for about 25 principals who sell food products, and it negotiates an annual volume of sales approximating $4,000,000 to $5,000,000 (R. 175–176). Among these seller principals is Canada Foods Limited, a Canadian processor of apple concentrate and similar products (R. 176–177). Canada Foods is also represented in the United States by several other brokerage firms, including Tenser & Phipps, Poole Company, and Cuyler (R. 178). The sales involved in this case were made to the J. M. Smucker Company ("Smucker"), of Orrville, Ohio, a manufacturer of apple butter and preserves (R. 176).

During negotiations in April and May 1954, Broch agreed to act as broker for Canada Foods, and its commission was established at 5% (R. 14, 74, 135, 149, 153, 178; Comm. Ex. 36, R. 127; Comm. Ex. 1C, R. 227, 229). Brokers, other than Broch, were appointed with the understanding that their commission would be 4% (R. 178). Broch received a higher commission because it stocked merchandise in advance of sales (*ibid.*).

On October 13, 1954, Canada Foods established its price on its 1954 pack of apple concentrate at $1.30 per gallon in 50-gallon steel drums, and authorized its various brokers, including Broch, to negotiate sales at that price (R. 144–145, 179; Comm. Ex. 14, R. 108; Comm. Ex. 22, R. 114).

The first attempt to sell the 1954 pack of Canada Foods' apple concentrate to Smucker was made not by Broch but by Phipps (of Tenser & Phipps), who contacted Smucker about October 1, 1954, several

weeks before Broch first contacted that buyer (R. 178). Upon receiving the quotation from Canada Foods, Phipps advised Smucker of the $1.30 price (R. 179).

Sometime between October 15 and 18, 1954, Smucker told Phipps that it was interested in purchasing approximately 500 barrels of the concentrate, but at a price lower than $1.30 (R. 179). Phipps transmitted this counter-proposal to Canada Foods, and discussed it in person with Canada Foods' manager on October 19, 1954. The latter told Phipps that $1.30 was Canada Foods' best price and that if it were not for a subsidy on apples by the Canadian Government, Canada Foods could not even sell at that low price (R. 179–180). This decision of Canada Foods to adhere to its established $1.30 price on the Smucker offer was immediately transmitted by Phipps to Smucker (R. 180). On October 20, 1954, Phipps attempted to secure a 10-day option from Canada Foods for Smucker on 500 to 700 barrels of apple concentrate at $1.30 (*ibid.*). Canada Foods replied by letter of October 25, 1954, that it could not hold the $1.30 price for the period requested since, in its estimation, the price was liable to rise (*ibid.*).

As late as October 26, 1954, Smucker specifically offered to purchase through Phipps 500 gallons of Canada Foods' concentrate at $1.25 (*ibid.*). Phipps wired the offer to Canada Foods that same day (R. 180–181). On October 27, 1954, Canada Foods' manager telephoned Phipps, again stating that his lowest price was $1.30, and that the only way that the price

could be lower would be if the brokerage were cut (R. 181). Phipps relayed the information to Smucker, explaining that the order could not be confirmed at $1.25 since Phipps was afraid that this would violate the Robinson-Patman Act (R. 181; Comm. Ex. 30, R. 121).

A day or two before the foregoing events of October 27, 1954, Broch contacted Smucker in an effort to sell apple concentrate on behalf of Canada Foods (R. 183). Smucker told Broch that it already had an offer from Canada Foods for $1.30 but that it would be interested in buying 500 drums at a lower price (*ibid.*). With knowledge that Canada Foods, through another broker, was already negotiating to sell Smucker approximately 500 drums of concentrate and was holding to its $1.30 price (R. 52–53, 57), Broch called Canada Foods and stated it could make the sale if the price were $1.25 per gallon (R. 183). Canada Foods took the proposition under advisement (*ibid.*). On October 27, 1954, the very day that Canada Foods told Phipps that the price could be reduced below $1.30 only if brokerage were cut, Canada Foods telephoned Broch and advised that it would make the sale at $1.25 per gallon provided Broch would agree to reduce its brokerage commission from 5% to 3% (R. 183–184). Broch agreed and advised Smucker that Canada Foods would sell to it at $1.25 per gallon (R. 184). The sale of 500 steel drums of apple concentrate at $1.25 per gallon was consummated (R. 184), delivery made (R. 185),

and Broch received 3% brokerage rather than the usual 5% (*ibid.*).[1]

The reduced price of $1.25 (accomplished in part through the reduction in brokerage) was thereafter accorded Smucker on all subsequent sales consummated through Broch in December 1954, in 1955, and up to the time that the hearings in this matter were closed in October 1956 (R. 185). On sales to all other customers, whether made through Broch or other brokers, the price continued to be $1.30 per gallon, and in each instance the broker, including Broch, received its full agreed-upon commission (R. 149–150, 185). It was only on sales to the one favored customer, made through Broch, that the selling price and brokerage were reduced (R. 35, 45, 185).

The Commission held that Section 2(c) of the Clayton Act "prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, directly or indirectly, to the buyer any part of his brokerage" (R. 208). It stated (R. 198) that "it was agreed

[1] Broch and the seller principal participated equally in the price concession granted the favored buyer. The sales to the favored buyer evidenced by the record amounted to $40,736.80 (R. 185). The customary brokerage fee of 5% to Broch on these sales would have been $2,036.84. The actual brokerage of 3% received by Broch on these sales amounted to $1,222.11. The total reduction in brokerage ($2,036.84 minus $1,222.11) amounted to $814.73, which is exactly 50% of the total price reduction of $1,629.47 granted by the seller principal, in cutting the price five cents per gallon. The latter computation is based on the figures set forth in Commission Exhibit 18, R. 231. While the exhibit shows, on the basis of a different calculation, that the broker contributed 55%, and the seller 45%, to the reduction in price (R. 232), the underlying data support our present conclusion of equal participation.

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between" Broch and Canada Foods that Broch "would receive a commission of 5 per cent on sales made by them"; that "[b]y accepting a commission of 3 per cent * * * [Broch was] giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession" (R. 198); and that this "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two percent of their commission to the buyer direct" (R. 209; see R. 199). Accordingly, the Commission held that Broch, by "granting and allowing, directly or indirectly, a portion of the commission or brokerage fee to which they are entitled from their seller principal * * * to * * * a buyer of food products in commerce, in connection with such buyer's purchase of food products in commerce" (R. 200), had violated Section 2(c) (R. 201), and issued its order directing Broch to cease and desist from such practices (R. 202, 211).

The Court of Appeals for the Seventh Circuit set aside the Commission's order.[2] The court held that "Neither the language of § 2 * * * (c) nor its legislative history indicates that a seller's broker is covered by § 2(c)" (R. 222). The court said that although the Commission had found that "Broch's acceptance of a reduced brokerage constituted a payment of part of their commission to Smucker, exactly as

[2] Judge Schnackenburg's opinion for the court stated that the Commission's findings of fact were not questioned and that "our duty [is] to apply the law to the facts and to determine whether [the Commission's] process of legal reasoning when applied to the facts is correct" (R. 219).

though Broch had paid 2% 'of their commission to the buyer direct' ", the facts merely showed that "because of Broch's agreement to reduce its commission, the seller was able to reduce its price"; and the court concluded that "[n]either in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 223–224). The court stated further that the Commission had "interested itself in a private grievance between rival brokers" and it "doubt[ed] whether the public interest * * * can be said to have been served by this proceeding against the seller's broker" (R. 223). The court also said that the Commission's interpretation of Section 2(c) would "promote price rigidity and uniformity contrary to the national antitrust policy", and that prohibiting a price reduction, the basis of which was a lower commission payment to the seller's broker, would mean that, so far as sales price is concerned, a seller's "costs are frozen without regard for the welfare of the public" (R. 224).

SUMMARY OF ARGUMENT

I. The Court of Appeals erred in holding that Section 2(c) of the Clayton Act does not apply to a seller's broker.

A. Section 2(c) makes it unlawful for "any person" engaged in commerce to pay or grant brokerage "or any allowance or discount in lieu thereof * * * to the other party to such [purchase or sale] transaction * * * except for services rendered in connection with the sale or purchase" of merchandise. On its face, this broad prohibition plainly covers the payment or granting of brokerage, or an allowance in lieu thereof,

by a seller's broker to a buyer. "Any person" includes a seller's broker, and when the latter grants an allowance in lieu of brokerage to a buyer, he is making such allowance "to the other party to such transaction." The judicial decisions which have considered the problem also indicate that Section 2(c) applies to sellers' brokers. See, especially, *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 770 (C.A. 4).

B. The legislative history of the Robinson-Patman Act confirms that Congress did not intend to make any exception, in favor of sellers' brokers, to the broad prohibitions against brokerage payments in Section 2(c). It shows that what Congress sought to prohibit was the passing on of brokerage to the buyer, not merely the doing so by particular persons. The basic design of the Act was to eliminate all devices by which large buyers could obtain discriminatory preferences over their small competitors. From this viewpoint, it is immaterial whether it is the seller or the seller's broker who passes on brokerage to a buyer. For in either case the result is that the favored buyer obtains a price concession through receiving part of the brokerage. While it is true that the particular evil with respect to brokerage which was called to the attention of Congress was the payment of "bogus" brokerage to a "dummy" under control of the buyer, Congress did not limit the prohibitions of Section 2(c) to such transactions, but broadly prohibited "any person" from paying brokerage to the other party to the transaction except for services rendered in connection therewith. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particu-

lar application may not have been contemplated by the legislators." *Barr* v. *United States,* 324 U.S. 83, 90.

The holding of the court below, that Section 2(c) contains an exception for brokerage payments made by a seller's broker, would create a serious loophole in the basic Congressional design of preventing large buyers from gaining unfair preferences over small ones by virtue of their greater purchasing power.

II. The Commission correctly held that Broch granted a portion of its brokerage to Smucker, in violation of Section 2(c), when it accepted less than its agreed-upon commission on sales to this particular buyer, in order to enable the latter to obtain a discriminatorily lower price.

A. Although Broch had an agreement with the seller that it would be paid five percent brokerage for its services, it accepted three percent on sales to Smucker, in order to enable this large buyer to receive a lower price not given to any other purchaser. On sales to all other customers, made both through Broch and through other brokers, the seller maintained its regular price and the brokers received their agreed-upon commissions.

Section 2(c) was designed to outlaw all forms of brokerage payments or allowances which might be used as devices to give favored buyers a discriminatory price advantage. We submit that the Commission correctly held that Broch's acceptance of the lower brokerage on sales to this particular buyer, done in order to enable the latter to receive a discriminatorily lower price, "constitutes a payment of part of their commission to the buyer exactly as though

[Broch] had paid two per cent of their commission to the buyer direct" (R. 209).

If the seller had paid Broch its full 5% brokerage and Broch had turned two-fifths of that amount over to the buyer, Broch would clearly have granted an allowance in lieu of brokerage to the buyer. But the economic effect was the same when Broch accepted a two-fifths reduction in its own commission, in order to enable the seller to pass the reduction on to the particular buyer in the form of a lower price. In both instances, a large purchaser is able to obtain a price concession, not available to smaller purchasers, through the device of the broker passing on to him part of his brokerage. That is precisely the kind of discriminatory favoritism that the Clayton Act was designed to prevent.

B. Respondent emphasizes the Court of Appeals' statement (R. 224) that the Commission's construction of Section 2(c) "would actually promote price rigidity and uniformity contrary to the national antitrust policy." Although, broadly speaking, "national antitrust policy" is to remove artificial restraints on free price competition, Congress has also determined that, because of their long-term consequences, certain forms of price competition such as concessions to favored buyers are unfair and contrary to the public interest. Thus, while the short run effect of prohibiting Broch from passing on part of his brokerage to the buyer may be viewed as tending toward "price rigidity and uniformity," Congress has decided that ultimately the public interest will be better served by preserving small retailers by protecting them against

the competitive advantage which large buyers would obtain if brokerage were passed on to them. To that extent the policy of the law, as here applied, complements rather than contradicts "antitrust policy".

Contrary to respondent's contention, the prohibitions of Section 2(c) are not limited to brokerage payments or allowances which involve "secret discriminations"; they also cover "open" payments or allowances. Nor did Congress intend that the only method for dealing with open price discriminations, accomplished through brokerage, is by proceeding against the seller for violating the price-discrimination prohibitions of Section 2(a).

ARGUMENT

I

THE PROHIBITION IN SECTION 2(C) OF THE CLAYTON ACT AGAINST "ANY PERSON" PAYING BROKERAGE, OR AN ALLOWANCE IN LIEU THEREOF, TO THE OTHER PARTY TO A PURCHASE OR SALE TRANSACTION, APPLIES TO A SELLER'S BROKER WHO PAYS OR ALLOWS PART OF HIS BROKERAGE COMMISSION TO A BUYER

Section 2(c) of the Clayton Act makes it unlawful for "any person" engaged in commerce to pay or grant brokerage "or any allowance or discount in lieu thereof * * * to the other party to such [purchase or sale] transaction" or to any agent of the latter, "except for services rendered in connection with the sale or purchase" of merchandise. The Court of Appeals held that "[n]either the language" of this section "nor its legislative history indicates that a seller's broker is covered by" it. We shall show, how-

ever, that the language of this section does cover seller's brokers; that its legislative history and administrative construction confirm this view; and that holding it inapplicable to seller's brokers would create a serious loophole in the basic Congressional design of the Robinson-Patman Act of preventing large buyers from using their superior purchasing power to gain a competitive advantage over small buyers.

A. On its face, Section 2(c) plainly covers the payment of brokerage (or an allowance in lieu thereof [3]) by a seller's broker to a buyer. The prohibition applies to the payment of brokerage by "any person"; there is no exception for a seller's broker. When a seller's broker pays brokerage to the buyer, he is making such payment "to the other party to such transaction.". For the broker is the representative of one party to the transaction (the seller), and the buyer is the "other party" thereto. Finally, the buyer plainly does not render any services to the broker for which he could be compensated. The payment of brokerage by a seller's broker to a buyer, therefore, comes within the specific terms of Section 2(c).[4]

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[3] We shall use the word "brokerage" to refer to the payment of brokerage or an allowance in lieu thereof.

[4] Respondent contends (Br. in Opp. 12) that throughout the Robinson-Patman Act the phrase "any person" "refers only to seller and buyer parties in commercial transactions" and that the phrase in Section 2(c) should therefore not be construed to cover seller's brokers. But there is nothing in the other subdivisions of the Robinson-Patman Act which limits the broad phrase "any person" to buyers and sellers; the furnishing of illegal discriminatory services or facilities would equally violate

Judicial decisions also indicate that Section 2(c) applies to seller's brokers. In *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763 (C.A. 4), the court upheld a Commission order under Section 2(c) prohibiting a buyer's broker from receiving brokerage from the sellers and paying it to the buyer. One of the attacks on the order was that the brokerage payments came within the exception in Section 2(c) because they were made for services rendered to the seller. Judge Parker, writing for a unanimous court, rejected the argument on the grounds that the commissions were actually received by the buyers and not by Oliver (the broker), and that "there can be no contention that any services are rendered by the buyers to justify the payment of compensation to them" (p. 769). The court further went on to state, however (p. 770):

> And even if it were true that Oliver rendered services to the sellers, we do not think this would change the situation. *No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer;* for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. * * * [Emphasis added.]

Section 2(e) whether done by the seller or by the latter's broker. Furthermore, the other subsections of the Robinson-Patman Act usually involve only a seller and a buyer, and not an intermediary; Section 2(c), on the other hand, necessarily involves a third person, the broker.

In *The Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667 (C.A. 3), certiorari denied, 308 U.S. 625, the court, in rejecting a similar contention that brokerage paid to a buyer's broker was compensation for services rendered to the seller, pointed out (p. 674) that:

> The edge of the paragraph [Section 2(c)] cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent.

The payment of brokerage by a seller's broker to a buyer constitutes a payment "to the adversary party [the buyer] by the other's [the seller's] agent." See, also, *Freedman* v. *Philadelphia Terminals Auction Co.*, 145 F. Supp. 820 (E.D. Penna.) where the court upheld, against a motion to dismiss, a complaint charging, *inter alia*, that a seller's broker had violated Section 2(c) by exacting from the buyers payments for services rendered for the sellers.

B. The legislative history of the Robinson-Patman amendments confirms that Congress did not intend to make any exception to the broad prohibitions against brokerage payments in Section 2(c) in favor of sellers' brokers.

The amendments "were enacted to eliminate" the "inequities" which resulted from the fact that, "[b]ecause of their enormous purchasing power," "large chain buyers" "were able to exact price concessions, based on differences in quantity" which put the "small independent stores * * * at a hopeless competitive disadvantage." *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69. The overall

design of the Act was to eliminate all devices by which particular buyers obtained preferential treatment, except insofar as they came within the narrow justifications for price discriminations provided in Section 2(b) of the Act. *Id.,* pp. 66–67; H. Rep. No. 2287, 74th Cong., 2d Sess., pp. 3, 6, 7, 8–11; S. Rep. No. 1502, 74th Cong., 2d Sess., pp. 3, 5–6. One of the devices through which "the large purchasers" obtained "competitive advantages" over the small stores was by obtaining "[r]ebates * * * for 'brokerage fees,' even though no brokerage services had been performed" (*Simplicity* case, *supra,* p. 69).

The legislative history of Section 2(c) shows that what Congress sought to prohibit was the passing-on of brokerage to the buyer, not merely the doing so by particular persons or in any particular form. Thus, the House Committee report on the bill stated (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 15) that the brokerage provision (which was then Section 2 (b)) "prohibits the direct or indirect payment of brokerage except for such services rendered"—that is, it "permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf". Similarly, the Senate Committee report on the Senate bill, which did not contain the "for services rendered" exception, stated (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7) that Section 2(b) "forbids the payment or allowance of brokerage, either to the other principal party, or to an intermediary acting in fact for or under the control of the other principal party, to the purchase and sale transaction." Finally, the conference report likewise

states (H. Rep. No. 2951, 74th Cong., 2d Sess., p. 7) that Section 2(c) "prohibits the direct or indirect payment of brokerage except for such services rendered."

Further evidence that Congress intended broadly to prohibit any payment or passing on of brokerage to the buyer (except for services rendered), regardless of the mode used in the particular transaction, and not just payments by the seller, is contained in the debates on the floors of Congress. Thus, Senator Logan, the chairman of the subcommittee which considered the bill, and its manager in the Senate, made the following statements during a floor colloquy on the measure prior to passage (80 Cong. Rec. 3115):

> Mr. George. What I wanted to get perfectly clear, if I could, was whether the same prohibitions relate to both the giver and the taker of a rebate in any form.
>
> Mr. Logan. *The prohibition is against its being done at all,* and, of course, it would apply to the giver as well as to the taker, although there is no criminal penalty provided.
>
> *   *   *   *   *
>
> Mr. George. I beg the Senator's pardon for interrupting his presentation. I had the impression that the bill did impose penalties on the giver of a rebate, and I wanted to know whether it imposed like prohibitions, or penalties or whatever the bill provides, on the taker.
>
> Mr. Logan. *The bill prohibits the act,* and that prohibition would extend to all who are affected by it. [Emphasis added.]

See, also, the statement by Representative Patman, the co-author of the bill, that "The measure also pro-

hibits payment or allowance of brokerage, commission, or other sales compensation to buyers" (80 Cong. Rec. 5728).

Since the purpose of Section 2(c) was to prohibit "the act" of passing on brokerage to the buyer "being done at all" (*Logan* statement, *supra*), it is immaterial whether it is the seller or the seller's broker who performs the act. Both are equally obnoxious from the point of view of preventing a favored buyer from obtaining price concessions through receiving part of the brokerage, and both were prohibited by Congress. A mass buyer seeking price concessions through reduction of brokerage is interested solely in obtaining a preferential price; he is not concerned with whether the brokerage is passed on to him by the seller or by the seller's broker.

It is true, as respondent points out (Br. in Opp. 10–11), that the particular evil with respect to brokerage which had been called to the attention of Congress was the payment of "bogus" brokerage—that is, the situation in which a dummy, under the control of the buyer, was designated as a "broker," and the seller, by paying commissions to this "broker," was able to rebate part of the purchase price to the buyer.[5] But Congress did not limit the prohibition of the payment of brokerage to payment by the seller to a broker under control of a buyer. On the contrary, it broadly prohibited "any person"

[5] The payment of such "bogus" brokerage was described in the committee reports as "Among the prevalent modes of discrimination at which this bill is directed". H. Rep. No. 2287, 74th Cong., 2d Sess., p. 15; S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7.

from paying brokerage to the other party to the transaction except for services rendered in connection therewith. "[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr* v. *United States*, 324 U.S. 83, 90.[6]

Congress, apparently recognizing that brokerage is susceptible of serious misuse as a device for giving preferential treatment to particular buyers, concluded that it was necessary broadly to ban all brokerage payments made by the seller or his agent to the buyer, except for services actually rendered by the broker to the former. To read Section 2(c) as containing

[6] The applicability of Section 2(c) to sellers' brokers is further supported by the "consistent administrative construction of the Act" (*Federal Trade Commission* v. *Mandel Brothers*, 359 U.S. 385, 391). In 1940, four years after its passage, the Commission issued its first complaint under Section 2(c) against a seller's broker; the following year it entered a cease-and-desist order against him. *W. E. Robinson & Co., Inc.*, 32 F.T.C. 370. Additional complaints were issued in 1941 (*D. J. Easterlin & Co.*, 33 F.T.C. 1639 (case dismissed; docket shows practices were discontinued)) and in 1945 (*Custom Housing Packing Corporation*, 43 F.T.C. 164 (cease-and-desist order entered on consent, September 23, 1946)). Subsequent to the complaint in the instant case, the Commission has issued a number of complaints charging sellers' (or, as they are sometimes called, primary) brokers with violating Section 2(c). (These complaints are listed in the Appendix, *infra*, p. 30.) While there have not been many cases prior to the instant one in which the Commission proceeded under Section 2(c) against a seller's broker, the significant fact is that it did initiate such a case shortly after the Act was passed, and that it has consistently adhered to the view that the Act does cover such persons.

Writers in the field who have considered the question have uniformly concluded that Section 2(c) is not limited to pro-

an exception for brokerage payments by a seller's broker to a buyer, would create a serious loophole in the basic Congressional design of preventing large buyers from gaining unfair preferences over small ones by virtue of their greater purchasing power. For the holding of the court below would permit a large buyer to demand and receive from a seller's broker a substantial direct rebate of part of the latter's commission. From the viewpoint of protecting the small independent purchaser against such dis-

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hibiting the payment of brokerage by the seller but also bans such payment by the seller's broker (sometimes referred to as an independent broker). For example, Congressman Patman, the co-author of the statute, gave an affirmative answer to the question whether the Robinson-Patman Act "prohibit[s] a broker from splitting his brokerage with a buyer." He pointed out that the Act "applies to any person. The intent of Congress, the reports of committees, and the Act are all specific on this point. The payment of any brokerage by the seller to the buyer is prohibited. The relationship of the broker to his principal is a fiduciary one. He is, in fact, representing the seller in this instance and would be liable." (Patman, *The Robinson-Patman Act* (1938), p. 108.)

See, also, Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act*, American Law Institute, Revised Ed. (November 1953), p. 108:

"Section 2(c) applies to transactions between an intermediary and a buyer, even where the seller is not involved. A broker, even though acting solely for the seller and not controlled by the buyer, may not split his commission with the buyer nor pass on brokerage to the buyer in the form of advertising allowances or promotion services."

Professor Oppenheim, the co-chairman of the Attorney General's National Committee to Study the Antitrust Laws, has concluded (Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 Geo. Wash. L. Rev. 511, 544 (1940)) that "[o]bviously even an independent broker cannot split his commissions with the buyer."

crimination, it is immaterial whether the favored buyer receives brokerage directly from the seller, or obtains the same amount from the broker as a rebate. Indeed, in cases in which the broker bills the buyer directly, the latter may not know, and certainly does not care, whether the lower price which he receives represents a passing on to him of part of the broker's commission, or a reduction in the seller's price.

II

BROCH GRANTED AN ALLOWANCE IN LIEU OF BROKERAGE TO THE BUYER WHEN IT ACCEPTED A LOWER COMMISSION IN ORDER TO ENABLE THE FAVORED BUYER TO OBTAIN A DISCRIMINATORILY LOWER PRICE FROM THE SELLER

In Point I, *supra,* we have argued that the prohibitions of Section 2(c) apply to a seller's broker. We shall now show that the Commission correctly held that the seller's broker (Broch) granted an allowance in lieu of brokerage to the buyer (Smucker) when it accepted a smaller amount than the previously agreed-upon commission, in order to enable the particular buyer to receive a discriminatorily lower price from the seller. Of course, it is well settled that "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the Commission." *Federal Trade Commission* v. *Pacific States Paper Trade Association,* 273 U.S. 52, 63.

A. Broch had entered into an agreement with the seller under which it was to be paid 5% brokerage for its services. When it agreed to accept a 3%

commission on the sale to Smucker of 500 barrels of apple concentrate—a particularly large transaction (see note 7, *infra*, p. 24)—it was aware that the buyer had already rejected an offer from another broker at $1.30 per gallon, and it had advised the seller that it could make the sale at $1.25. In agreeing to sell at the lower price, the seller expressly conditioned the offer on Broch's reducing its brokerage commission from 5% to 3%. Significantly, the effect of this reduction by Broch was that Broch and the seller split the amount of the price concession equally (see note 1, *supra*, p. 7). Furthermore, the seller gave the lower price of $1.25 only to Smucker and it was only with respect to this particular purchaser that Broch received a lower commission. All other sales to all other purchasers made through all brokers, including Broch, were made at the seller's regular price of $1.30, and on all of them the brokers received their regular agreed-upon commission. As the examiner correctly concluded (R. 198), "[b]y accepting a commission of 3 per cent * * * respondents were giving up part of what they were entitled to receive, with full knowledge of the fact that their contribution would redound to the benefit of the buyer in the form of a price concession."

Section 2(c) was designed to outlaw all forms of brokerage payments or allowances which might be used as devices to give favored buyers a discriminatory price advantage. See *supra*, pp. 16–20. To this end, the Act broadly makes it unlawful "to pay or grant, or to receive or accept, anything of value as a

commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered." We submit that the Commission correctly held that Broch's acceptance of the lower brokerage on sales to Smucker "constitutes a payment of part of their commission to the buyer exactly as though [Broch] had paid two per cent of their commission to the buyer direct" (R. 209).

Clearly, if the seller had paid Broch the full five percent brokerage to which it was entitled and Broch had turned over 40 percent of that amount to the buyer, Broch would have granted an allowance in lieu of brokerage to the buyer. But the economic impact upon the buyer and broker was the same when Broch accepted a 40-percent reduction in its commission, in order to enable the seller to pass that reduction on to the particular buyer in the form of a lower price. In either situation, the large purchaser is able to obtain a price concession not available to smaller purchasers,[7] through the device of the broker passing on to him part of his brokerage fee. As we have shown (see *supra*, pp. 16–22), that is precisely the kind of discrimi-

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[7] Smucker's purchase of 500 barrels was an unusually large sale, far greater than the buyer and broker had anticipated would be made by the broker (R. 6). The examiner pointed out (R. 188) that when Broch was appointed as a broker by Canada Foods in the fall of 1954, "it was contemplated that he would sell approximately 1,000 drums a year to all his customers"; that Broch testified "that it was contemplated the sales to any one customer would not exceed 50 to 100 drums"; and that the seller's official with whom Broch had dealt had had the "impression that no one in the United States could use more than 250 barrels". See R. 75, 134–135, 154.

natory favoritism that the Clayton Act was designed to prevent. The buyer's dealings were with Broch, not with the seller; and it was Broch who passed along the price reduction to the buyer. Under a realistic reading of the Act, therefore, Broch did grant an allowance in lieu of brokerage when, in order to insure that a favored large buyer would obtain a discriminatorily lower price, it accepted a reduction in its own usual commission.[8] The ruling of the court below that the facts showed only that "because of Broch's agreement to reduce its commission, the seller was able to reduce its price," and that "[n]either in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224), ignores the realities of the transaction and exalts its form over its substance.

B. Respondent emphasizes (Br. in Opp. 1, 15–16) the Court of Appeals' statement (R. 224) that the Commission's construction of Section 2(c) in this case "would actually promote price rigidity and uni-

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[8] The Commission does not contend that the granting by a seller of a lower price to a particular buyer, coupled with a reduction in brokerage, "automatically" compels the conclusion that there has been a payment of brokerage to the seller. On the contrary, the Commission has made it clear that whether there has been a payment of brokerage in such circumstances depends upon all the facts in the particular case. *Main Fish Co., Inc.*, 53 F.T.C. 88 (July 30, 1956). Of course, the granting of a lower price to a favored buyer may involve the payment of brokerage to the buyer. *The Great Atlantic and Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667, 672–673 (C.A. 3), certiorari denied, 308 U.S. 625; *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607, 611 (C.A. 4), certiorari denied, 326 U.S. 774.

formity contrary to the national antitrust policy"; and it urges (Br. in Opp. 8, 15) that the decision below is in accord with this Court's observation that the Robinson-Patman Act must be "reconcil[ed] * * * with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co. v. Federal Trade Commission,* 346 U.S. 61, 74. Although, generally speaking, the general "national antitrust policy" is to remove artificial restraints upon free price competition, Congress has also determined that, because of their long-term consequences, certain forms of price competition are not in the public interest. Thus, although price concessions to favored buyers may, in the first instance, permit such buyers to pass these concessions on to the public in the form of lower prices, Congress has recognized that such "[u]nfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have been symbolic * * * in the end [of] high prices to consumers and large profits to the owners" (H. Rep. No. 2287, 74th Cong., 2d sess., p. 17).

In the instant case, the short-run effect of prohibiting Broch from passing on part of its brokerage to the buyer may be viewed as tending toward some "price rigidity and uniformity." Congress, however, has decided that ultimately the public interest will be better served by protecting small retailers against the competitive advantage which large buyers would obtain if brokerage could be passed on to them, and thereby to preserve the economic position of the small

merchants as a vital link in the distributive process. In this respect the objectives of the Sherman and the Robinson-Patman Acts are complementary rather than contradictory; Congress has made the judgment that, whatever may be the immediate consequences of the particular practices condemned in Sections 2(a) to 2(e) of the Clayton Act, in the long run they are likely to have an adverse effect on the public interest, and should therefore be proscribed along with other practices destructive of fair competition such as monopolies and restraints of trade.

Respondent further contends (Br. in Opp. 11) that the prohibitions of Section 2(c) are limited to brokerage payments which involve "'secret' discriminations." A simple example will refute this contention. If a seller dispensed with his broker's services in making a particular sale, and then openly reduced the selling price by the exact amount of brokerage involved, this would constitute an allowance "in lieu of brokerage" by the seller to the buyer in violation of 2(c). In such a case, however, the illegal allowance would be completely "'open' and obvious from the face of the invoice * * *" (Br. in Opp. 10). In other words, contrary to respondent's suggestion (Br. in Opp. 11), Congress did not intend that the only procedure for dealing with "open" brokerage payments or allowances to a seller, which are the means of accomplishing illegal price discriminations, is by proceeding against the seller for violating the price-discrimination prohibitions of Section 2(a). For Congress has singled out the payment or allowance of brokerage as a separate and distinct violation in

Section 2(c); and the Commission may proceed against any violation thereof, without regard to whether other aspects of the same transaction might violate other sections.[9]

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[9] The court below, citing *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, expressed doubt that the instant proceeding was in the public interest (R. 223). The *Klesner* case arose under the Federal Trade Commission Act, 38 Stat. 717, which authorizes the Commission to proceed against unfair methods of competition only if it appears to the Commission that a proceeding "would be to the interest of the public" (Section 5). But there is no such limitation in a proceeding under Section 11 of the Clayton Act, 15 U.S.C. 21, to enforce Section 2(c) of the Act. The distinction in this respect between a proceeding to enforce the Trade Commission Act and a proceeding to enforce Section 2(c) of the Clayton Act is succinctly stated in *Webb-Crawford Co.* v. *Federal Trade Commission*, 109 F. 2d 268, 269 (C.A. 5), as follows: "The Congress considered the effect on commerce of the things named in subsection (c), and absolutely prohibited them. The trade commission is not to enter on any enquiry about their evil effect, nor whether a proceeding would be in the public interest. Its duty is to enforce the prohibition." In any event, a proceeding to eliminate anti-competitive practices condemned by Congress plainly is in the public interest, even though it be described as a "private grievance between rival brokers" (R. 223) and the discriminatory practices resulted in favoring only a single buyer. Cf. *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207, 211.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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OCTOBER 1959.

APPENDIX

FEDERAL TRADE COMMISSION PROCEEDINGS (INSTITUTED AFTER THE INSTANT CASE) IN WHICH SELLERS' BROKERS HAVE BEEN CHARGED WITH VIOLATING SECTION 2(C) OF THE CLAYTON ACT

Case	*Date Complaint Issued*	*Disposition*
Daniel H. Sobo, et al. (Docket No. 6633) (buyers also charged).	Sept. 13, 1956.	Cease-and-desist order, March 22, 1957 (consent).
Dehn & Co., Inc., et al. (Docket No. 6977).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
Gavin Bros., Inc., et al. (Docket No. 6978).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
McGovern and McGovern, et al. (Docket No. 6980).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
The Salmon and Tuna Sales Company, et al. (Docket No. 6981).	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
Ivar Wendt (Docket No. 6982)	Dec. 12, 1957.	Cease-and-desist order, July 3, 1958 (consent).
Wards Cove Packing Company, et al. (Docket No. 7021) (seller also charged).	Dec. 31, 1957.	Cease-and-desist order, July 3, 1958 (consent).
F. A. Gosse Company, et al. (Docket No. 7099).	Mar. 27, 1958.	Cease-and-desist order, October 16, 1958 (consent).
Puget Sound Brokerage Co., et al. (Docket No. 7151).	May 20, 1958.	Cease-and-desist order, February 17, 1959 (contested).
C. F. Buelow Company, et al. (Docket No. 7154).	May 26, 1958.	Cease-and-desist order, November 19, 1958 (consent).
Parks Canning Company, Inc., et al. (Docket No. 7200) (seller also charged).	July 18, 1958.	Cease-and-desist order, February 12, 1959 (consent).
E. H. Hamlin Associates, et al. (Docket No. 7204).	July 23, 1958.	Cease-and-desist order, February, 12, 1959 (consent).
Point Adams Packing Co., et al. (Docket No. 7210) (seller also charged).	July 23, 1958.	Cease-and-desist order, December 5, 1958 (consent).
Emard Packing Co., Inc., et al. (Docket No. 7249) (seller also charged).	Sept. 11, 1958.	Cease-and-desist order, February 12, 1959 (consent).

U.S. GOVERNMENT PRINTING OFFICE 1959

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No. 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

The legal theory advocated by the Federal Trade Commission in this case raises serious questions in the administration of a coordinated national antitrust policy.[1] The Court of Appeals concluded that the Commission's statutory interpretation "would actually

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[1] Both the petition and the brief filed on behalf of the FTC lack the customary signature of the Antitrust Division of the Department of Justice. The Solicitor General's petition advises that "In appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved" (Pet. 12 n. 7).

promote price rigidity and uniformity contrary to the national antitrust policy" (R. 224). Since the Commission does not dispute that at least the "short run effect" of its enforcement of the Robinson-Patman Act is "tending toward 'price rigidity and uniformity'" (FTC Br. pp. 12, 26), once again called into play is this Court's formula, pronounced in the landmark *Automatic Canteen* case, "to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." 346 U.S. 61, 74 (1953).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 218-224) is reported at 261 F. 2d 725 (1958). The opinion of the Federal Trade Commission (R. 204-211) is not yet officially reported.

QUESTION PRESENTED

As detailed by this Court in the *Simplicity Pattern* case last June, the Congressional plan in the Robinson-Patman amendments of the Clayton Act was to impose "absolute" and more severe prohibitions on certain "secret" and disguised price discriminations, such as "false brokerage allowances," than on open price differentials. 360 U.S. 55, 68, 69 (1959). Under the statutory provisions governing price discrimination, price differentials are lawful unless they impair competition, and cannot be "justified" by reference to the seller's cost savings or good faith meeting of competition. The "absolute" and unconditional ban on concealed discriminations was designed to force price variations out into the open, where they "could be more readily detected and where it would be much easier to make accurate comparisons with any alleged

cost savings," so that the "benefits of more economical processes" which Congress wished to preserve for the consumer would be "made available in *price* differentials or not at all." *Id.* at 68, 71 n. 18.

This proceeding concerns an open price reduction granted in a competitive situation by a seller to a buyer for a large quantity sale permitting cost economies, coupled with the acceptance of a smaller rate of commission by the seller's broker.

In a case of first impression (cf. Pet. 6), the FTC did not proceed against the seller or the buyer under the provisions pertaining to price discrimination. Instead, the Commission condemned the broker's acceptance of a reduced fee as tantamount to the broker's having "indirectly" paid an illicit brokerage allowance to the buyer within the meaning of the "absolute" prohibitions of Section 2(*c*) of the Act (R. 207-209). Upon review, the Court of Appeals unanimously set aside the Commission's order (R. 224).

The focal question before this Court is whether a broker taking a smaller rate of commission when the seller principal openly reduces his price is guilty of granting to the buyer an allowance "in lieu" of an illicit brokerage payment in violation of Section 2(*c*)—irrespective of the cost or competitive considerations which would make the seller's price lawful under the provision governing variations in price.[2]

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[2] The Commission's brief has broadened the issue into two "questions" presented in obverse sequence (Br. p. 2). The first and hypothetical question *presumes* the issue to be decided under the second question, *i.e.*, it *assumes* that an illicit payment *is* made by a broker taking a smaller commission.

Furthermore, the Commission's "Questions Presented" intro-

STATUTE INVOLVED †

The pertinent provisions of the Clayton Act, as amended by the Robinson-Patman Act, are as follows—

Section 2(c), the so-called Brokerage Clause, declares:

> "It shall be unlawful for any person * * * to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 15 U.S.C. § 13(c).

The pertinent text of Sections 2(a) and (b), prohibiting injurious and unjustified price discriminations by sellers, declares:

> "It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person

duces the incorrect premise that respondent acted "in order to" facilitate a "*discriminatorily* lower price" (Cf. Br. p. 2, with Pet. 2) (Emphasis supplied throughout this brief). The fact is that the seller's price reduction was open, competitive, and related to cost economies (see pp. 9-10, *infra*).

† For the convenience of the Court, the legislative history of Section 2(c) is reprinted at the end of this brief.

who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *. 15 U.S.C. § 13(a).

"* * * *Provided, however,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C. § 13(b).

Section 2(f), defining the liability of the recipient of price discriminations, provides:

"It shall be unlawful for any person * * * knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

STATEMENT

The Essential Facts

Respondent Henry Broch & Company, a partnership between Henry Broch and Oscar Adler, operates as an independent sales representative or broker by negotiating the sale of frozen foods and other food products for suppliers to processors and other buyers (R. 175). The sellers typically compensate respondent with a commission computed as a specified percentage of the sales price—ranging from 1 to 5½% depending on various considerations important to the respective prin-

cipal (R. 22, 71, 130). Every sale negotiated by respondent is "subject to confirmation of seller," and no commission becomes due until after the seller has confirmed and the buyer has paid (R. 63-64; Pet. Ex. 2-A, R. 95; Res. Ex. 2, R. 157). Respondent transacts for its twenty-five seller principals an annual volume of $4 to $5 million, earning an average rate of 3% (R. 72, 175-176), *i.e.,* annual gross revenues below $150,000.

The controversy here grows out of a sales transaction for apple concentrate negotiated by respondent in October 1954 for the seller, Canada Foods, Ltd., a processor of apples at Kentville, Nova Scotia, with the buyer, J. M. Smucker of Orrville, Ohio, a maker of apple butter and preserves.

Respondent first represented Canada Foods in the spring of 1954, and was designated agent for the Midwest area at a prospective 5% rate of commission (Pet. Ex. 36, R. 127). The seller, who paid commission rates up to 10% in South America (R. 130), also appointed three other brokers in the United States, including Tenser & Phipps of Pittsburgh, Pa., at a 4% commission rate (R. 178).

While earlier quoting a price as high as $1.85 per gallon of apple concentrate (Pet. Ex. 36, R. 127), Canada Foods in October 1954 instructed respondent as well as Tenser & Phipps to sell the 1954 pack at $1.30 per gallon in fifty-gallon steel drums, $1.25 in wooden barrels and $1.32 in six-gallon cans (Pet. Ex. 22, R. 114).

In separate negotiations first with Tenser & Phipps and then with respondent with whom he dealt before (R. 75), Smucker offered to take about 500 steel drums, admittedly "an unusually large sale" (FTC Br. p. 24

n. 7), if he could buy at $1.25 per gallon (R. 32, 51, 78-79). In the words of Smucker's purchasing agent, who also had offers of European concentrates, "we were offered the commodity at $1.25 and we saw no reason why we should pay $1.30 for the same item" (R. 53, 56). Smucker hence would go no higher than $1.25 (R. 18).

Respondent transmitted the Smucker offer to Canada Foods by telephone, also informing the seller of the availability of competitive prices (R. 79-80).[3] Canada Foods' manager told respondent he would "sharpen my pencil, and let you know" (R. 80). The next day he called back to accept Smucker's bid of $1.25 per gallon, informing respondent, "You are going to receive three per cent brokerage" (R. 80), and giving him "permission to sell on these conditions" (R. 137). Respondent objected, but "he cut me off pretty fast," and so realized that nothing would be gained by haggling "because he told me that is it" (R. 80).

The sale to Smucker was accordingly consummated by respondent at $1.25, a reduction of 5 cents per gallon, for an initial sale of 500 steel drums, supplemented by several other shipments (R. 82).

All elements of the transaction were fully reflected on the seller's and the broker's invoices and books, including the sales price of $1.25 (Pet. Exs. 2-A-9, R. 95-103), and the broker's commission of 3% (Pet. Ex.

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[3] The accusation that respondent knew of the competitive activity of the other broker (FTC Br. pp. 6, 23) is not borne out by the record (R. 52-53, 57, 79), and is ill-taken in light of the industry-wide injunction prohibiting concerted restraints of trade by the organized food brokers including the coercion of brokers which solicit others' accounts. *National Food Brokers Ass'n*, 52 F.T.C. 372 (1955).

17, R. 111). The buyer paid the open invoice price of $1.25, was neither apprised of nor concerned with any broker's commissions, and of course received nothing from the respondent (R. 54).

In the meantime, Phipps, the rival broker angling for the sale, also learned from the seller that he would have to take less than his expected 4% commission rate in such a transaction (R. 33, 36, 49). Phipps thereupon sent a letter warning Smucker, the buyer, that

> "We could confirm the order at the price of $1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print.
>
> "It would be a feather in somebody's cap to decorate us with the violation and further, we do not believe that you are the kind of folks that would want to go along with a deal of this kind knowingly.
>
> "Frankly, we do not know how to handle the situation. We do hate to lose the business, but there is nothing that we can put together that will come up with the right answer and leave us with clean slates, all of which we regret exceedingly" (Pet. Ex. 30, R. 121-22).[4]

Phipps also ~~wrote~~ to Canada Foods, sought documentation as to the price arrangements with other brokers, and knowledgeably advised:

> "The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger con-

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[4] With respect to the "feather in somebody's cap," Phipps, who appeared as main witness for the FTC, stated later that "I know that if it was found out by any member of the National Brokerage Association that wanted to have a gripe, why, it could be anybody" (R. 44).

cerns. * * * We had hoped to do a great big business with you folks, but on the basis of what has happened on this deal, we feel that our hands are more-or-less tied, because it has not been our custom to work with unclean hands" (Pet. Ex. 31, R. 122).

By contrast with Phipps, the transaction was viewed by all participants as an open and normal competitive price adjustment:

The buyer wanted to buy an economical large quantity, and saw "no reason why" he should pay 5 cents more than the $1.25 available from other sources (R. 53, 56). He had "no knowledge" of and was "not concerned" with the private arrangements between seller and broker, and at all times viewed the transaction in terms of "price and not of brokerage" (R. 54).[5]

From the seller's viewpoint, the 4% price reduction from $1.30 to $1.25 per gallon was entirely profitable. As seen by Canada Foods, large orders permitted cost economies in "containers, freight, duty and shipping," as well as processing (R. 131-133), whereas one "cannot save anything on a small order" (R. 132). In addition, the seller has "to compete with European competitors, sometimes the brokers call me and say I can get a big order if he can compete with the European competitors and sometimes United States competitors" (R. 131)—as reflected in the broker's call relating to the competitive offers surrounding the Smucker transaction (R. 79-80).

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[5] There is nothing in the record to indicate whether Smucker was in competition with any of the seller's customers who paid different prices for apple concentrate, or to what extent, if any, the 4 per cent price reduction to Smucker in 1954 could possibly affect their competitive position in the food processing industry within the meaning of the Robinson-Patman Act.

Finally, respondent, as broker, did not lose on the transaction, despite the smaller commission rate which ultimately materialized. Admittedly "Smucker's purchase of 500 barrels was an unusually large sale, far greater than" anticipated, since originally Broch's projected sales on behalf of Canada Foods for an entire year to all customers were estimated at 1000 barrels, with sales to any one account not exceeding 50 or 100 drums (FTC Br. p. 24 n. 7). By accepting a 3% commission rate, respondent thus closed a large sale which otherwise could have been entirely lost, at a greater *total* commission than a smaller sale would have brought at a higher commission *rate* (R. 81). Basically, so far as the broker was concerned, the Smucker transaction produced "a very large order, and it is much cheaper in our office because, in order to obtain smaller customers for the same sized order, we might have to make thirty or forty or fifty or sixty long distance calls which are very costly in time and expense, actual cash expense, and on this three per cent, we would make more" (R. 81).

The Commission Proceedings

On January 11, 1956, the Commission issued its complaint charging that respondent had violated Section 2(*c*) of the amended Clayton Act by having "granted and allowed" a buyer "approximately 60 percent" of the brokerage commission "paid" respondent by the seller for respondent's services (R. 3). Specifically, the complaint alleged that respondent had "earned" its "normal and customary" 5% commission in the Smucker transaction, but "did not receive" it because it had "requested" the seller to lower its price to the buyer and "to recoup" for himself in part by deducting

"approximately 60 percent of the customary rate of commission or brokerage fee regularly allowed said respondents and other brokers" (R. 4).

Respondent contested the charges in all material respects. According to the answer, his brokerage commission "may vary from time to time and from sale to sale," and the anticipated 5% commission from Canada Foods "was based on contemplated sales of much smaller quantities than the sale in question" (R. 6). Asserting that the price reduction was the seller's unilateral decision, the answer detailed the seller's obvious "savings" in such a large transaction, and stressed the competitive offers available (R. 7-8). Finally, respondent emphasized the realistic business considerations behind his own willingness to take a smaller commission rate on a bigger transaction, since his return on such a deal was proportionally greater than from a number of small sales at a higher rate which required more time, effort, and expense (R. 8).

Although the key charge of the complaint was not established at the hearings, the Commission nevertheless held respondent in violation of Section 2(c) on another legal theory. The FTC Examiner's report dismissed as "immaterial" the failure of proof that respondent "requested" the seller to lower its established price to the buyer and "to recoup part of such loss" by reducing respondent's "customary" commission (R. 198). The Federal Trade Commission, adopting the Examiner's ruling, regarded it sufficient that "by acquiescence, ratification, confirmation, agreement, or otherwise" respondent received a smaller commission which was "contemporaneous with the price reduction by Canada Foods to Smucker and amounted to a shar-

ing of the price reduction by Broch and Canada Foods" (R. 209).[6]

To fit the case within the prohibition of Section 2(c) on payments of illicit brokerage commissions or allowances "in lieu thereof" by "any person" to the other "party" or that party's intermediary, the FTC ruled that "it is the office of that subsection to outlaw the diversion of brokerage to buyers, or any form of commission or sales compensation, to buyers in any manner, directly or indirectly, from any source" (R. 207). The FTC's opinion and order further theorized that respondent's acceptance of a 3% rate of commission "constitutes a payment of part of their commission to the buyer exactly as though respondents had paid two per cent of this commission to the buyer direct," and that respondent "instigated and granted payments in lieu of brokerage to the buyer Smucker" (R. 204, 209-210).

The Commission, by "Reflection upon the climate which produced the Clayton Act, as amended by the

[6] The FTC brief portrays as quite significant its "present conclusion" that respondent and the seller "participated equally" to the tune of 50 per cent each in the lower price to the buyer (pp. 7 n. 1, 23), which apparently supersedes previous counts by the Commission of 60 per cent (Cplt., R. 4), 55 per cent (Pet. Ex. 18, R. 232), and 42 per cent (Prop. Fdgs. of Staff Counsel, p. 15). There was, of course, no "customary" or "usual" 5 per cent rate for respondent (FTC Br. pp. 7 n. 1, 25), who received from 1 per cent to 5½ per cent (p. 5, *supra*). The latest FTC calculations in any event are no less spurious than the earlier numbers, by postulating a *5 per cent* commission at a price of *$1.25* although no transaction at these figures did or ever could have transpired. The sole alternatives were a 5 per cent rate at $1.30 which the buyer would not pay, and a 3 per cent rate at $1.25 for an unforeseeably large quantity which gave the broker a proportionately greater net return than he expected in smaller transactions at 5 per cent.

Robinson-Patman Act," also stated that "the language of subsection 2(*e*) is so clear that it is unnecessary to resort to the reports of Congress to ascertain what was intended" (R. 207).

Respondent's contentions with respect to the seller's cost economies and competitive responses in relation to its price reduction were rejected out of hand (R. 205, 210). Without explaining why it failed to proceed conventionally here under the statutory provisions expressly governing price differentials, the Commission declared that "The complaint in this proceeding was issued under subsection 2(c), not under subsection 2(a), and the several defenses available to price discrimination charges under subsection 2(a) are not applicable to a proceeding under subsection 2(c)" (R. 210).

Finally, the Commission's opinion dismissed respondent's claim that the public interest was defeated by a proceeding rooted in a private grievance between rival brokers (R. 210), and failed to address itself to the conflict between its application of the statute to maintain broker's fees and national antitrust policies in light of this Court's *Automatic Canteen* opinion (Res. App. Br. FTC Dkt. 6484 pp. 25-27).

Accordingly, the Commission entered a cease and desist order which unconditionally prohibited respondent from paying, "directly or indirectly" to any buyer an "allowance or discount in lieu of brokerage or any part or percentage thereof,"

> "by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may

be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service" (R. 202, 204, 211).

The Decision Below

The Court of Appeals unanimously disapproved the Commission's theory and set its order aside.

In the court's opinion, "The most that can be said is that, because of Broch's agreement to reduce its commission, the seller was able to reduce its price. Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224). Rejecting FTC counsel's interpolation of the word "from" into the statutory text banning false brokerage payments by the seller to buyers or to their brokers, or "any allowance or discount in lieu thereof," the court declared that "Neither the language of § (2) or (c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that [respondent], as seller's broker, did not violate § 2(c)" (R. 222). The court stressed that respondent was "an agent solely of the seller," that "no agent of the buyer is involved," and that here "the buyer does not suggest or even know of the reduction in the seller's brokerage commission" (R. 223).

The court also observed that the Commission ignored the public interest by having "interested itself in a private grievance between rival brokers, Tenser & Phipps and Broch" (R. 223).

The court concluded that the Commission's interpretation of Section 2(c) "would actually promote price

rigidity and uniformity contrary to the national anti-trust policy" (R. 224). As analyzed by the court,

> "The effect of [the FTC] order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal" (R. 223).

But

> "Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution. Trade restraints in the distribution of groceries surely do not occupy a preferred anti-trust position, as distinguished from comparable situations" (R. 224).

SUMMARY OF ARGUMENT

I. Section 2(*c*), the so-called Brokerage Clause of the Robinson-Patman Act, does not prohibit an independent broker representing the seller from accepting a lower commission rate on a particular sale where the seller at the same time openly reduces his price to the buyer for a large lot in a competitive situation.

A. As retraced by this Court's recent *Simplicity Pattern* opinion, Congress in the Robinson-Patman Act carefully distinguished between open price reductions and discriminatory prices camouflaged by the payment of "false" brokerage commissions to the buyer side. In order to prevent evasion of the Act's basic provisions governing variations in price, Section 2(*c*)

bans absolutely such false brokerage payments by the seller to the buyer or to the buyer's agent, or allowances "in lieu thereof." The rationale of this "absolute" ban was to force price quotations into the open, for measurement by the statutory criteria under which price variations are lawful if they do not harm competition or can be "justified" by the seller's cost economies or "good faith" meeting of competition.

In harmony with the legislative design, the courts have uniformly limited Section 2(c) to concealed transactions which reflect illicit brokerage payments from the seller to the buyer or the buyer's agent, or substitute arrangements where "allowances or discounts" were granted "in lieu" of such *illegal* payments. Courts have rejected two other attempts to apply the "absolute" ban of the Brokerage Clause against openly quoted price reductions reflecting savings in *legitimate* commissions of the seller's broker, and have refused to outlaw them as allowances "in lieu" of brokerage within the prohibition of Section 2(c).

The Commission's novel theory of condemning as illegal *per se* an open price reduction unrelated to an *illicit* brokerage payment not only contravenes the text, history, and judicial application of Section 2(c), but does not even square with the Commission's previous position before this Court in the *Simplicity* case and the views of its own authorities which confirm that the Brokerage Clause is not a proper vehicle for outlawing those open price reductions which Congress wished to preserve under the pricing provisions of the Act.

B. Regardless of whether a lower price reflecting a reduction in a *legitimate* broker's commission may be

deemed an illicit allowance "in lieu" of brokerage as between the seller and the buyer, Section 2(c) does not penalize the acceptance of a smaller fee by the independent seller's broker as an "indirect payment" by him to the buyer via the seller's lower price.

In the first place, Section 2(c)'s text does not pertain to payments by a seller's broker—in accord with the legislative purpose that payments by the seller to buyers' agents should be scotched, while the independent seller's broker was not to be "interfered with." The prohibition of Section 2(c) on false brokerage payments by any "person" to the "other party" or the agent of the "party to such transaction other than the person by whom" such payment is made obviously equates such "persons" with "parties." It is not directed at a seller's broker who is not a "party." The legislative reports conclusively corroborate the text's specification of liability by *sellers* for *payments*, although brokers can be liable for illicit *receipts*.

Furthermore, while a broker's *receipt* of commissions then paid over to the buyer as a "rebate" to cover up a price discrimination may be reached by Section 2(c), here there was no payment of any kind by the broker in the entirely open price transaction. The FTC's esoteric theory that a broker's acceptance of a smaller commission constitutes an illicit "indirect payment" by him to the buyer is without foundation in the statute, and is refuted by the statutory text and history which confirms that a broker "can charge whatever his employer may be willing to pay."

The Commission's unprecedented attempt to penalize an independent seller's broker in an open price transaction by the "indirect payment" theory runs counter to the Robinson-Patman history in the courts

for over two decades, and entails an impermissible manipulation of the statutory text.

II. The Federal Trade Commission's doctrine, which admittedly promotes "price rigidity and uniformity," creates needless conflict between the Robinson-Patman Act and the antitrust laws' policy of fostering competitive prices for the benefit of the consuming public.

An "absolute" prohibition of open price reductions coupled with lower brokers' fees under Section 2(*c*) must inevitably operate to maintain the commissions of food brokers at artificially high levels, policed by the FTC—contrary to antitrust proscriptions which have long condemned similar arrangements as restraints of trade.

The maintenance of brokers' fees defeats the Congressional assurances that the Robinson-Patman law was not designed to "shelter or protect brokers" or "affect legitimate brokerage," but to foster open price differentials reflecting "more economical processes." The Commission's theory obviously flouts this Court's admonitions to "reconcile" the interpretation of the Robinson-Patman Act with "the broader antitrust policies" of Congress, and to confine strictly any "privilege restrictive of a free economy."

The FTC's rationalization for this departure by reference to "small merchants" prejudiced by an alleged "serious loophole" in favor of "large buyers" misstates the import of the decision below which leaves discriminatory exactions fully subject to the appropriate statutory provisions, and is belied by the Commission's current enforcement campaign against the very practices said to be sanctioned.

Rather, the "feather in somebody's cap" from such Section 2(c) enforcement belongs to the organized food brokers, whose fees would enjoy a privileged legal sanctuary sheltered by the Federal Trade Commission from the stresses of competition.

Paradoxically, the FTC's interpretation of the Brokerage Clause would thus benefit a special business class, at the expense of the public which must "ultimately defray the resultant costs of distribution."

ARGUMENT

I.

THE ACCEPTANCE OF A SMALLER COMMISSION RATE BY AN INDEPENDENT SELLER'S BROKER, COUPLED WITH THE SELLER'S OPEN PRICE REDUCTION, IS NOT AN ILLICIT PAYMENT "IN LIEU" OF BROKERAGE TO THE BUYER ON THE BROKER'S PART.

Part IA of our argument will show that the transaction comprised by the seller's open price reduction and the broker's acceptance of a reduced commission rate does not give rise to a *per se* illegal allowance "in lieu" of illicit brokerage under Section 2(c). Part IB will demonstrate that, irrespective of whether the lower price by the seller to the buyer constitutes a forbidden "allowance in lieu of" brokerage, the acceptance of a smaller commission by the independent seller's broker in such a transaction is not the payment of an illicit "allowance" by him to the buyer within the meaning of Section 2(c).

A. An Open Competitive Price Reduction Unrelated to An Illicit Payment of Brokerage to the Buyer Side Is Not a Forbidden Allowance "In Lieu" of Brokerage.

As confirmed by this Court's analysis in the recent *Simplicity Pattern* opinion, Section 2(c) was designed to prevent evasions of the basic statutory prohibition

on price discrimination by means of subterfuge arrangements. The statute permits variations in price unless they are detrimental to competition, and unless they cannot be "justified" by the seller's cost economies or good faith efforts to meet competition. Sections 2(a)(b)(f), 15 U.S.C. § 13(a)(b)(f). By contrast, Section 2(c)'s prohibition on "false" brokerage payments to buyers or their intermediaries, once a favorite camouflage for price discriminations, was made "absolute"—in order to flush price variations into the open for scrutiny under the basic statutory prohibitions which sift the forbidden monopolistic discriminations from beneficial competitive price reductions.

As detailed below, the FTC's novel theory perverts the statutory plan by treating a competitive open price transaction as a *per se* illegal allowance "in lieu" of brokerage, departs from every judicial ruling in point, and contradicts the Congressional understanding and the Commission's representations in the *Simplicity* case.

(1) The Legislative Design of Section 2(c) Was to Strike at Concealed Price Variations by Sellers in the Guise of Brokerage Payments.

As originally enacted, the Clayton Act of 1914 contained a disabling flaw. Because Section 2 prohibited only discriminations in *price* detrimental to competition, 38 Stat. 730 (1914), the Federal Trade Commission's Report on the Chain Store Investigation in 1934 concluded that the law was being circumvented by A&P and other chains which exacted discriminatory concessions in the form of false "dummy" brokerage

payments or "bogus" advertising allowances "not appearing on the face of the invoice."[7]

The prime concern of the so-called Brokerage Clause of the Robinson-Patman amendments to the Clayton Act in 1936 was to catch such evasion and subterfuge for price differentiation. Senator Logan, Chairman of the Subcommittee of the Senate Judiciary Committee considering the bill, thus explained to the Senate:

> "The broker has a field all his own and he should not be interfered with. In order to evade the provisions of the Clayton Act, however, it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about.
>
> "I undertake to say in this august body that there is not a Member of the Senate, there is not a Member of the House, who will not at once condemn a practice of that kind, which provides secret re-

[7] See Federal Trade Commission, Report on the Chain Store Investigation 57-59 (1934). This aspect of the FTC Report was incorporated into the hearings on the Patman bill in 1935. Hearings before the House Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 204 (1935) (hereinafter cited as Patman bill hearings).

bates under the guise of brokerage." 80 Cong. Rec. 6281 (1936) (pp. 11a-12a, *infra*).[8]

The text of Section 2(*c*) was framed to scotch such subterfuge arrangements. The original Brokerage Clause in the Robinson and Patman bills was directed solely at outright commission payments by sellers to buyers' fronts, without reaching such payments direct to the buyers themselves. To cover also such illicit payments or their equivalent to buyers, the Senate added to the original prohibition on false brokerage payments to buyers' fronts the phrases "or any allowance or discount in lieu thereof," and "either to the other party to such transaction [or his intermediary]."

With this revision, the Senate Judiciary Committee explained, the Brokerage Clause barred "the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made." S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936) (see pp. 2a-3a, *infra*).[9]

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[8] The identical vice was depicted in the legal analysis of Mr. H. B. Teegarden, Counsel of the U. S. Wholesale Grocers Association, who was presented to the House Judiciary Committee by Rep. Patman as the draftsman of the Patman bill and the expert as to its meaning. Patman bill Hearings, pp. 9, 27-28, 258 (p. 14a, *infra*). In analyzing the Patman bill for the House Judiciary Committee, Mr. Teegarden explained its concern with "dummy-brokerage allowances" and "pseudo-advertising allowances" because these were "favorite disguises under which large buyers wring their exactions." Patman bill Hearings, pp. 16, 31 (p. 14a, *infra*).

[9] Cf. Section 2(b), H. R. 8442 and S. 3154, 74th Cong. (1935), Patman bill Hearings, p. 1. The pertinent clause was drafted in terms of "persons" and "parties," rather than specifically

(2) The Courts Universally Apply the Brokerage Clause to Concealed Discriminations, and Bar Its Application to Open Price Reductions Without Subterfuge.

Quite recently, this Court's *Simplicity Pattern* opinion retraced the legislative design of the Robinson-Patman Act to separate open prices, which are lawful unless inimical to competition and not legally "justified," from those discriminatory transactions camouflaged as brokerage arrangements which are unconditionally banned by Section 2(*c*). *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959).

This Court's opinion carefully compared the scope of the Act's price discrimination provision, "which is hedged with qualifications," with the "absolute" proscriptions of the subsections under which "false brokerage allowances and the paying for or furnishing of nonproportional services or facilities were banned outright." *Id.* at 64-67. The Court noted the "continual references" in the Congressional history of the Robinson-Patman Act to the "false brokerage" practices outlawed by Section 2(*c*) as "secret" discriminations which created "competitive advantages" for their recipients in "ways other than direct price concessions." *Id.* at 68 n. 12, 69.

In accord with the *Simplicity* opinion's premise that open price reductions were not the province

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addressed to buyers or sellers, in order to reach also a dummy brokerage payment *by* the *buyer to* the *seller's* intermediary. See Mr. Teegarden's explanation, Patman bill Hearings, p. 218 (p. 16a, *infra*).

The repeated assertions that "dummy brokerage" was only *one* "among" several targets of the purported "broad prohibition" of Section 2(*c*) (FTC Br. pp. 8, 10, 19 n. 5, cf. 9, 16, 17, 18, 20), confuses the diverse aims of the several subsections of the *entire bill* with the particular and specific goal of Section 2(*c*) as detailed by the legislative history reprinted at pp. 1a-18a, *infra*.

of the Brokerage Clause, concealment and subterfuge have been the key elements in the courts' application of Section 2(c). For "the gist of the violation under Section 2(c) is not that discriminatory prices have been charged, but that the parties have engaged in a practice designed to deceive others as to the price charged and paid, whether or not discriminatory." *Federal Trade Commission v. Washington Fish & Oyster Co.*, 1959 CCH Trade Cases par. 69,487, at p. 75,919 (9th Cir. Oct. 12, 1959).

Thus, in the bellwether *Biddle* decision, the Second Circuit in 1938 hit the statute's original target of brokerage commissions paid by sellers to a buyer's purchasing organization, and declared:

> "If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller. One of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers." *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 692 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938).[10]

The Fourth Circuit in two cases similarly viewed Section 2(c) as aimed at the "concealed advantage" secured by "the buyer who receives the brokerage allowed his purchasing agent."[11]

[10] This rationale has been reiterated by the several appellate decisions which banned the acceptance of brokerage commissions from sellers by buyers' intermediaries. See cases collected at note 31, *infra*.

[11] *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 771 (4th Cir. 1939); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 611 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

The further ban of the statute on any "allowance or discount in lieu" of such an illicit brokerage payment to the buyer side was illuminated by the *A&P* case in the early years of the Act. Prior to the Robinson-Patman amendments, A&P had pocketed brokerage commissions from sellers through ostensibly independent "field buying agents," which were actually in A&P's employ and secretly passed back the brokerage commissions they collected. 26 F.T.C. 486, 495 (1938).[12] Instead of such false brokerage payments, A&P's buyers thereafter secured quantity discounts providing for equivalent rebates; and so-called "net prices" reflecting deductions in the amount of the former spurious brokerage commissions. *Id.* at 495-496.

In a landmark ruling affirmed by the Third Circuit, these receipts were outlawed because they represented "an amount equal to the brokerage which but for the Robinson-Patman Act said sellers would have paid" to A&P's field buying agents; were "passed on by the sellers and accepted by the respondent to take the place of, and in substitution for, brokerage paid to the respondent's field buying agents prior to that date"; and accordingly "were allowances and discounts in lieu of brokerage and were affirmatively intended as such by both sellers and the respondent." *Id.* at 496, 501.[13]

[12] In 1934, the Second Circuit also prohibited A&P under the Packers and Stockyards Act from the "unfair, discriminatory, and deceptive" practice of setting up a former employee who masqueraded as an independent provision broker, but acted as a "dummy" for A&P to which he turned over his commissions minus expenses. *Tranz Pork Stores, Inc.* v. *Wallace*, 70 F. 2d 688 (2d Cir. 1934).

[13] The Commission found, moreover, that A&P's discriminatory exactions were severely harmful to competition on both the seller and the retail distribution levels. *Id.* at 499.

On review, the Court of Appeals condemned these "devices" by A&P as conceived "in attempted avoidance of the provisions of the Robinson-Patman Act." 106 F. 2d 667, 672, 675 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).[14]

The *A&P* case thus epitomizes the statutory prohibition on substitute allowances or discounts to a buyer "in lieu" of *illicit* brokerage payments, which was added by the Senate Judiciary Committee (p. 22, *supra*) to "prevent evasion of the restriction through a mere modification of the form of the sale contract. It was assumed that large buyers would seek to convert the brokerage which they had hitherto received into an outright price reduction."[15]

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[14] It was not contested that these payments to A&P were made and received "in lieu" of the illicit brokerage commissions previously paid to A&P's fronts, so the court had no occasion to elaborate on that statutory phrase. Conceding it had obtained "allowances or discounts in lieu of" brokerage, A&P asserted unsuccessfully that these were nevertheless lawful because of "services rendered" by A&P to the sellers. See Brief for A&P, pp. 13, 19; Brief for FTC, p. 11; Reply Brief for A&P, pp. 11-12.
In view of A&P's conceded allowances "in lieu of" false brokerage fees, the *A&P* decision properly held also that the cost proviso of Section 2(a) could not be read into a case *if* properly within Section 2(c). 106 F. 2d 667, 677 (3d Cir. 1939). But here the Commission (R. 210) turns *A&P* upside down by urging that an open price differential related to reductions in *legitimate* commissions *thereby* becomes an allowance "in lieu" of illicit brokerage flatly prohibited by Section 2(c) regardless of cost economies or other legal justification. See Note, The Brokerage Provision of the Robinson-Patman Act, 47 Yale L.J. 1207, 1210-12 (1938).

[15] Zorn & Feldman, Business Under the New Price Laws 219 (Prentice-Hall 1937). This object of the "in lieu" phrase is corroborated in an *ante litem motam* analysis by a FTC official last year. Seidman, Some Aspects of the Law Concerning Pric-

But no court in two decades of the Robinson-Patman Act has prohibited an open price coupled solely with a reduction in a *legitimate* broker's fee as an illicit allowance "in lieu" of brokerage—as illustrated by two recent decisions in point.[16] In both cases, a seller of plastic cups had terminated the services of his sales agent, thereby eliminating his commission, and sold a large lot directly to the buyer at a reduced price reflecting these commission savings. Two independent decisions by separate district courts dismissed the suit of the discharged sales agent asserting that the lower price was an absolutely illegal discount or allowance by the seller to the buyer "in lieu" of brokerage under Section 2(c).

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ing, in Competitive Pricing 59, 63 (A.M.A. Management Report No. 17, 1958).

The Fourth Circuit also viewed the *A&P* case as "involving an allowance of brokerage made directly to the buyer because of alleged services rendered the seller by the buyer's purchasing agents." *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607, 610 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945). Cf. *Robinson* v. *Stanley Home Products, Inc.*, 174 F. Supp. 414, 417 (D. N.J. 1959).

[16] *Southgate Brokerage*, cited by the Commission in addition to the *A&P* case (Br. p. 25 n. 8), concerned a buyer who also functioned as a broker on the side, and received brokerage commissions either by separate check from the seller, or made a deduction from the seller's invoice price and remitted the lesser amount. 150 F. 2d at 608. See also the commercial bribery cases collected at note 32, *infra*, such as *Freedman* v. *Philadelphia Terminals Auction Co.*, 145 F. Supp. 820 (E.D. Pa. 1956), cited by the FTC (Br. p. 16).

In the *Washington Fish & Oyster* case, p. 24, *supra*, the court refused to reopen an old FTC order, and viewed the instant decision below as resting on the premise that "a seller reduced the fee to be paid to his broker for bona fide brokerage services in order to quote a competitive over-all price to a buyer," whereas there a commission was "paid to the buyer."

The District Court for New Jersey, dismissing the case against the seller, emphasized that the Act did not curtail the right of a seller to lower its prices by dispensing with the legitimate fees of its own broker. *Robinson* v. *Stanley Home Products, Inc.*, 174 F. Supp. 414, 417-18 (D. N.J. 1959).

The District Court for Massachusetts, rejecting the case against the buyer, declared that "the reduction or elimination of a commission or brokerage fee payable by the seller *to its own agent* to enable the seller to sell at a lower price is not forbidden" by the Brokerage Clause. *Robinson* v. *Stanley Home Products, Inc.*, 1959 CCH Trade Cases par. 69,501, at p. 75,974 (D. Mass., March 18, 1959).

(3) The Text and Purpose of Section 2(c) Contradict the FTC's Novel Characterization of an Open Price Reduction, Related to a Legitimate Broker's Fee, as an Illicit Brokerage Payment.

The FTC's challenge to an open price reduction as a concealed brokerage payment not only advocates an upside-down perspective of the Act contrary to the judicial consensus, but directly contravenes the text and purpose of Section 2(c)'s ban on any "discount or allowance in lieu" of an illicit brokerage payment.

According to the FTC brief, "If a seller dispensed with his broker's services in making a particular sale, and then openly reduced the selling price by the exact amount of brokerage involved, this would constitute an allowance 'in lieu of brokerage' by the seller to the buyer in violation of 2(c)" (Br. p. 27). Codifying this premise, the Commission's order unconditionally prohibits, as an "allowance or discount in lieu of brokerage," any "reduction in price * * * accompanied by a reduction in the regular rate of commission,

brokerage or other compensation currently being paid" to a broker by his seller principal (R. 202, 204).

Moreover, such illegality would attach irrespective of any competitive effects; regardless of the seller's necessities of reducing his price in good faith to meet a competitor's equally low price as permitted by Section 2(b); notwithstanding the seller's savings in an economical transaction which can "cost-justify" a lower price under Section 2(a); and despite the understanding of the transaction by all parties in terms of price rather than brokerage (see pp. 9-10, *supra*).[17]

But as established by the legislative history, illustrated by the *A&P* case, and confirmed by the two recent district court decisions, the absolute prohibition of Section 2(c) strikes at allowances "in lieu" of *illicit*, not legitimate, brokerage payments. As broadened by the Senate Judiciary Committee, the detailed text of Section 2(c) proscribes "any allowance or discount in lieu" of the forbidden payment of "anything of value

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[17] The suggestion that the FTC ruling at bar concerns special "facts" in a "particular case" which are impervious to judicial review (Br. pp. 22, 25 n. 8) is refuted by the FTC's treatment of all pertinent issues as "legal questions" and "legal issues" (R. 190, 206), as did the court below (FTC Br. p. 8 n. 2). The FTC's *Main Fish* ruling (Br. p. 25 n. 8) discusses whether a particular price reduction was causally related to or "in lieu" of a particular brokerage commission, but is irrelevant to the dispositive statutory consideration that Section 2(c) proscribes no lower prices "in lieu" of *legitimate* brokerage payments.

Indeed, if the Commission has correctly labeled the controversy here as a *factual* question, this alone would require affirmance of the judgment below pursuant to this Court's "usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543, 544 (1927); *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958).

as a commission, brokerage, or other compensation * * * to the other party" or that other party's "agent, representative or other intermediary * * *" (See text at p. 4, *supra*). Section 2(c) manifestly does not undertake to outlaw open price reductions "in lieu" of legitimate commission payments by a seller to his *own* broker for services rendered.[18]

Actually, Senator Logan, the Chairman of the Subcommittee studying the bill and its Senate manager, gave precise assurances that "you can deduct legitimate brokerage. This sham brokerage is what this bill is aimed at. It is perfectly proper under this bill to pay and deduct legitimate brokerage."[19] Representative Patman avowed that the bill "will in no way shelter or protect brokers," and "Sales may be made directly from a manufacturer to the retailer or to con-

[18] The FTC brief would escape measurement of the Commission's legal theory of an "allowance in lieu of" brokerage (p. 12, *supra*) against the words of Section 2(c)—simply commencing to "use the word 'brokerage' to refer to the payment of brokerage *or* an allowance in lieu thereof" (Br. p. 14 n. 3).

Such convenient abbreviations must not fog up the statutory text and legislative intent. The brief's textual elision would throw the entire Act askew, since Section 2(c) also covers any "commission" or "other compensation" apart from "brokerage." Hence the brief's device not only could absolutely outlaw under Section 2(c) an "allowance or discount" entirely legal under Section 2(a) or (f), but would also jeopardize a "payment" of "compensation" on "proportionally equal terms," as permitted by Section 2(d), 15 U.S.C. § 13(d), since the "services rendered" exception in the Brokerage Clause does not protect buyers' services to sellers. See cases cited note 31, *infra*.

[19] Senator Logan's statement was made in comparing the Robinson-Patman bills with alternate criminal proposals which were subsequently appended as Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13a. Hearings before a Subcommittee of the Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess. 53 (1936).

sumers." *Id.* at 7760, 7886.[20] Also, the Senate/House Conference Committee expressly deleted a proposed proviso which could have prevented savings in legitimate brokers' fees from supplying "cost-justification" for a seller's lower price.[21] Representative Utterback, Chairman of the Conferees, explained to the House that "there is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer," *id.* at 9418, and

> "There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular cus-

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[20] Mr. Teegarden, the Patman bill's draftsman, also assured the House Judiciary Committee that it "leaves anyone free to select his broker or dispense with his services as he sees fit." Patman bill Hearings, p. 217 (pp. 15a-16a, *infra*).

[21] As Senator Logan explained to the Senate, "In the second section of the committee amendment there is a provision that in making discriminations or differentials, or whatever we may choose to call them, all costs other than brokerage shall be allowed; and it has been said that the words 'other than brokerage' in that section ought to go out.

"I have thought a good deal about that suggestion. I think perhaps legitimate brokerage ought to be allowed as part of the costs; and I think when the bill was drafted—I did not write the bill—perhaps in the amendment which was inserted by the Judiciary Committee of the Senate we had in mind dummy brokerage, sham brokerage. It may be that something should be done about that." 80 Cong. Rec. 6285 (1936). That exception was then deleted by the Conference Committee, confining the prohibitions on brokerage within the four corners of the Brokerage Clause. *Id.* at 9414.

tomers whose distinctive methods of purchase and delivery make them possible." *Id.* at 9417.[22]

By now asserting that brokerage fees *must not* be reduced regardless of the seller's competitive price variation, the Commission not only defeats the Congressional guarantees, but adopts the very excrescences of the Brokerage Clause which were decried by Senator Logan two decades ago as among the "rather fantastic ideas advanced" to discredit the legislation.[23]

The theory of Section 2(c) now advocated by the Commission cannot even square with its own previous professions. This Court's *Simplicity* opinion, stressing the difference between the "absolute" ban on concealed price discriminations through "secret" and "false brokerage allowances," on the one hand, and the flexible provisions governing open price variations, on the other, drew on this affirmation in the Commission's *Simplicity* brief:

> "Paying brokerage to the buyer, or furnishing to him facilities not accorded in like measure to all other buyers, is discrimination cloaked as a legitimate business transaction. Congress denominated practices of this kind as 'abuses', and accordingly outlawed them. The outright prohibitions were designed to bring variance in treatment of differ-

[22] Several examples, including savings as between "traveling-salesmen solicitation" and direct selling, were cited as "illustrative of the way in which the bill permits the translation of differences in costs into price differentials as between the customers concerned, no matter where those differences arise." *Id.* at 9417. Nevertheless, a recent Commission complaint, building on its doctrine here, has attacked a seller's price reductions related to reduced salesmen's commissions, as *per se* illegal allowances "in lieu of" commissions. *Thomasville Chair Co.*, Dkt. 7273 (Oct. 7, 1958).

[23] Hearings, *supra* note 19, at 54. See also Logan statement, 80 Cong. Rec. 3118 (1936).

ent purchasers *into the open, as price differentials, which could be proceeded against, if at all, under the carefully framed provisos and limitations of §2(a)*" (FTC Br. p. 23).

Confronted here with a price variation brought "into the open," Commission counsel turn their advocacy inside out and reverse their field. Now the theory is:

"Nor did Congress intend that the only method for dealing with open price discriminations, accomplished through brokerage, is by proceeding against the seller for violating the price-discrimination prohibitions of Section 2(a)" (FTC Br. pp. 13, 27).

But as recently observed by the *Robinson* decision, in line with this Court's *Simplicity* rationale,

"The evil aimed at by Section [2(c)] was the evasion of the ban on price discrimination by using the payment of so-called brokerage fees or commissions by the seller directly or indirectly to the buyer as a mask for what was really a reduction in price. Here where the price was allegedly reduced, plaintiff tries to reverse the argument by contending that a price reduction should be considered the payment of an illegal commission." *Robinson* v. *Stanley Home Products, Inc.*, 1959 CCH Trade Cases par. 69,501, at p. 75,974 (D. Mass., March 18, 1959).

The FTC's verbal somersault lacks any visible means of legal support even from the Commission's own reference sources (Br. p. 21). A recent Patman Committee Report to Congress on price discrimination and the Robinson-Patman Act declared:

"False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' cate-

gory; rather it falls into the trap deliberately set for it by the law. Discriminatory concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to show their true character, and *to be measured by the sections of the law dealing with discrimination.*" H.R. Rep. No. 2966, 84th Cong., 2d Sess. 97-98 (1956).

And according to the analysis of the Commission's prime legal authority (Br. p. 21):

> "We do not believe that the purpose of Section 2(c) was to give independent brokers a preferred status, or to prohibit true price differentials allowable under Section 2(a) and arrived at in the open and normal course of the seller's business. * * * If the objective of 2(c) was to bring price discriminations into the open, then when they are brought into the open the validity of the differentials should be tested under 2(a)." Austin, *Discrimination in Practices*, in *How to Comply with the Antitrust Laws* 174, 179-80 (CCH 1954); *Price Discrimination and Related Problems under the Robinson-Patman Act* 115 (A.L.I. 2d Rev. ed. 1959).

What the Commission has done, in sum, is to treat an open price reduction coupled with a reduced *legitimate* broker's fee as an unconditionally prohibited allowance in "lieu of" false brokerage, so as to condemn under Section 2(c) an open price transaction which Congress sought to preserve under Section 2(a).

B. The Broker's Receipt of a Reduced Commission Is Not An "Indirect" Payment of An Illicit Allowance "In Lieu" of Brokerage to the Buyer.

Apart from the fact that a seller's open competitive price reduction coupled with a smaller broker's fee is not an allowance "in lieu" of illicit brokerage, which

alone requires affirmance of the judgment below, the Commission's theories *vis a vis* the independent seller's broker participating in such a transaction are *a fortiori* invalid on additional grounds.

This part of our argument develops that Section 2(c), as corroborated by its legislative history and judicial interpretation, applies specifically to illicit brokerage commission payments *by* the seller, the one principal party, *to* the buyer, the other principal party, *or to* the buyer's intermediary in a sales transaction. While the Brokerage Clause reaches illicit *receipts* by brokers, it does not undertake to regulate *payments* on the part of brokers. In any event, there is no statutory foundation for the esoteric doctrine that acceptance of a smaller fee by the seller's broker is *pro tanto* an "indirect payment" of the difference by the broker to the buyer, via the seller's lower price. The Commission's novel theory is not only incompatible with two decades of judicial interpretation of the Robinson-Patman Act, but entails an inadmissible manipulation of Section 2(c)'s text.

(1) The Brokerage Clause Does Not Penalize Independent Brokers Acting Solely for the Seller.

The text and history of Section 2(c) establish its aim to prevent false brokerage payments by one party to the other party directly or through that other party's agent, *i.e.*; payments by the seller to the buyer or to the buyer's agent, and enacts no liability for the independent seller's broker who is not a party to the sales transaction.[24]

[24] A seller could, of course, be liable under 2(c) for staging a false brokerage payment to the buyer by a broker or anyone else for whose actions he was responsible. Cf. *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 770 (4th Cir. 1939).

As restated by the bellwether judicial interpretation of Section 2(c) in 1938, "It is clear that the statute prohibits payment of brokerage [1] by the seller [2] to the buyer [3] or *his* agent or representative or controlled intermediary except for services rendered." *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 691 (2d Cir. 1938), *cert. denied*, 305 U. S. 634 (1938). And Senator Logan, floor manager of the bill, assured the Senate in 1936 that "It is not aimed at the legitimate practice of brokerage, because brokerage is necessary. The broker has a field all his own and should not be interfered with." 80 Cong. Rec. 6281 (1936). See also *id.* at 3114, 3118, 7886.

Simply put, Section 2(c) (see text at p. 4, *supra*) strikes at illicit brokerage payments *by* "any person" *to* the "other party" or to an intermediary acting for the "party" "other than the person" who makes the paymen When the "limiting clause" containing the word "other" is applied to its "last antecedent," these "persons" who may not make false payments are manifestly equated with "parties." Cf. *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). For a "person" paying something to the "other party" must likewise be a "party," and the intermediary acting for the "person" "other than the party" by whom he is paid must be acting for a "party," too.[25] The

[25] For example, a "person" charged under a statute of the United States with attacking either *another* American or the wife of the *American other than* the "person" committing the crime must perforce be an American himself. To paraphrase Mr. Justice Holmes, "Words having universal scope * * * will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the [Commission] subsequently may be able to catch." *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909). Cf. also *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402 (1916); *Fahey Bros., Inc.* v. *Filardo*, 336 U.S. 281, 287 (1949); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 486, 489 (1940).

equation of "persons" and "parties" in Section 2(c), moreover, is in harmony with the framework of the entire Act.[26]

Since a seller's broker does not function as a "party," he is not comprehended by this prohibition on a "person" making payments. Rather, as heretofore universally understood, Section 2(c) prohibits *a seller's* payment of false brokerage to the buyer or to the buyer's agent, and holds liable the payors as well as the recipients of such a payment.[27] While a broker

[26] The numerous prohibitions on "persons" in other provisions relating to discriminations invariably denote selling or buying principals in business dealings. *I.e.*, Section 2(a) and (b) (sellers); 2(c) (sellers and buyers); 2(d) and (e) (sellers); 2(f) (buyers). Whenever liability goes beyond the buyer or seller "parties," as in those specific dummy transactions covered by Section 2(c), the statutory text says so in so many words. Thus, Section 3 of the Robinson-Patman Act makes it illegal for any "person" to "be a party to, *or assist in*" forbidden transactions. 15 U.S.C. § 13a.

The Commission's contrary assertion (Br. p. 14 n. 4) is not documented with any case. Actually, intermediaries have been affirmatively *excluded* by the Commission from proceedings concerning discriminatory promotional practices. *P. Lorillard Co.* and others, Dkts. 6592 *et seq.* (interventions denied, Oct. 2-3, 1956), *aff'd on other grounds,* 267 F. 2d 439 (3d Cir. 1959).

[27] One FTC official last year also advised, "Section 2(c) of the Robinson-Patman Act is a fairly simple provision which, for all practical purposes, says that *the seller may not pay* to the buyer, the buyer's agent, or anybody acting for or in behalf of the buyer, or under his control, a brokerage fee or commission, or a discount in lieu thereof, in connection with the buyer's own purchases." Siedman, *supra* note 15, at 63. To the same effect, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 105 (A.L.I. 2d Rev. ed. 1959); Oppenheim, Selected Antitrust Developments in the Courts and the Federal Trade Commission During the Past Year, 15 A.B.A. Antitrust Section Proceedings 37, 69 (1959). The FTC brief's citation of Oppenheim and Austin as supporting authorities (p. 21) is rather cheerful in view of their criticism of the Commission's basic theory. Oppenheim, *id.* at 68-69; Austin, *supra*, at 115.

thus may be liable for *receiving* illegal payments from the seller, there is no penalty in the text for *paying* on the part of brokers.

Had Congress sought to place a broker acting solely for the seller on the same legal footing as the suspect buyer's dummy or agent, it strains credulity that the verbose text of the Brokerage Clause lacks the one word saying so (cf. R. 222).

Rather, the legislative reports corroborate Senator Logan's assurances that the independent broker who represents the seller "should not be interfered with." 80 Cong. Rec. 6281 (1936). The House Judiciary Committee and the Senate/House Conferees explained Section 2(c)'s ban on false brokerage payments in identical words:

> "It prohibits its allowance *by the buyer* direct to the seller, or *by the seller* direct to the buyer; and it prohibits its payment *by either* to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other." H. R. Rep. 2287, 74th Cong., 2d Sess. 15 (1936); H. R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936) (see pp. 1a-4a, *infra*).

That universal understanding was reconfirmed in the debates. Senator Logan advised that the provision "forbids the payment or allowance of brokerage either to the *other principal party*, or [its] intermediary," 80 Cong. Rec. 3114 (1936); and provides that "no buyer shall engage in this trick brokerage practice whereby a rebate may be made *by the seller.*" *Id.* at 6282. Representative Patman assured the House that the bill would "prohibit *one party* from bribing the *representative of the other* under the guise of brokerage allowances or commissions." *Id.* at 7760.

Representative Utterback, the Chairman of the Senate/House Conferees, carefully explained the text of the Brokerage Clause immediately preceding enactment:

> "[I]t prohibits the payment or allowance of commissions or brokerage on the purchase or sale of goods either to the other party to the transaction or to an intermediary who is acting in fact for or under the control of the other party to the transaction; that is, the party other than the one who pays the commission or brokerage in question. * * * [I]f an intermediary is employed, and is in fact acting for or under the control of the buyer, then the *seller cannot* pay him. Or if he is acting for or under the control of the seller, then *the buyer cannot pay* him. And where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by *either party to the other.*" *Id.* at 9418.

If Congress in Section 2(c), notwithstanding its text, nevertheless set out to penalize an independent seller's broker not acting for the buyer side, its failure to reveal any trace of that purpose in the voluminous hearings and debates is beyond belief.[28]

[28] See legislative history collected at pp. 1a-18a, *infra.* The Commission's concession that its "particular application may not have been contemplated by the legislators" (FTC Br. p. 20) is surely an understatement. Its brief nowhere refutes these conclusive expressions of legislative intent, and the single cropped colloquy quoted for a "broadly" framed prohibition on brokerage payments "regardless of the mode," *i.e.*, that "*The bill prohibits the act* and that prohibition would extend alike to all that are affected by it" (Br. pp. 18-19) (italics in brief), omits the immediately following exchange: "Mr. George. Both to the giver and to the taker, of course? Mr. Logan. Yes; that is true." 80 Cong. Rec. 3115 (1936). See full legislative history pp. 1a-18a, *infra*; cf. *A&P* opinion, 106 F. 2d at 676-677.

(2) No Foundation Exists for the Concept of "Indirect" Payments by a Broker Via the Acceptance of a Smaller Commission in an Open Price Transaction.

There is no statutory foundation for the FTC's "indirect payment" theory—the esoteric concept of the acceptance of a smaller commission as *pro tanto* a brokerage "payment" of an "indirect" nature by the broker to the unwitting buyer via a price reduction by the seller (R. 204, 208-209). On the contrary, Senator Logan assured the Senate that "A legitimate broker can charge whatever his employer may be willing to pay without the violation of any provisions of the proposed act." 80 Cong. Rec. 3118 (1936) (p. 11a, *infra*).

At the outset, a broker's secret rebate payments covering up a price discrimination by the seller to the buyer have neither semblance nor relevance to the "open price" case at bar.[29] Here the seller's as well as the broker's invoices reflected the actual price quoted by the seller and paid by the buyer (pp. 7-8, *supra*);

[29] Though no court has adjudged the precise point, it has been assumed that a broker ostensibly acting for the seller may not *receive* a commission from the seller, and then pay the buyer a "rebate" or "kickback." As we explained below (Pet. Reply Br. p. 19), in such a case where the actual price paid is concealed by connivance or "dual representation," the broker is acting partially for the buyer and may be unlawfully *receiving* a commission from the seller partly in the buyer's behalf, *i.e.*, as an "intermediary" or "agent" of the buyer within the ban of Section 2(c). *E.g., Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F.2d 763, 770 (4th Cir. 1939); *Kentucky Rural Electrical Coop Corp.* v. *Moloney Electric Co.*, 175 F. Supp. 250, 254 (W.D. Ky. 1959); The Robinson-Patman Act, Its History and Probable Meaning 38 (Wash. Post 1936); Note, 36 Col. L. Rev. 1285, 1314 n. 157 (1936). Buyers' agents who made money payments to the buyer side were held liable by the court below for *receiving* commissions from the seller for the buyer. *E.g., Independent Grocers Alliance Distributing Co.* v. *Federal Trade Commission*, 203 F.2d 941, 942-944 (7th Cir. 1953); *Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F.2d 970, 972, 974-977 (7th Cir. 1945).

the buyer had no knowledge of the broker's arrangements (p. 9, *supra*); and the Court of Appeals emphasized that "Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224). See also *Robinson v. Stanley Home Products, Inc., supra*, pp. 27-28. Whatever may be the liability of brokers for *receiving* money then paid over to the other side, there was no such receipt or payment here.

Furthermore, whenever the Robinson-Patman law sought to proscribe "indirect" payments by anyone, the statutory text expressly employs that term. See, *e.g.*, the basic prohibition on a seller discriminating in price, "directly or indirectly." 15 U.S.C. § 13(a). Section 2(c) itself contains the word "indirect" to reach agents under the "direct or indirect" control of the buyer (see text, p. 4, *supra*).

The legislative history supports Senator Logan's assurance that the seller's broker "can charge whatever his employer may be willing to pay." 80 Cong. Rec. 3118 (1936). The Committee reports show that the only "indirect" brokerage payments contemplated by Section 2(c) were illicit payments *by the seller through the buyer's intermediary*, rather than by the seller to the buyer direct.[30]

The theory of "indirect payments" by brokers whose acceptance of a smaller fee purportedly gives the buyer an illicit "allowance in lieu of" brokerage thus lacks foundation anywhere along the line.

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[30] The FTC brief (pp. 17, 18) quotes isolated phrases in the reports, but omits the immediately following sentences which explain the above meaning of the cropped quotations. Compare the complete text of the Committee reports on the provision, pp. 1a-4a, *infra*.

(3) The Commission's Novel Interpretation of Section 2(c) Runs Counter to Two Decades of Judicial Precedent and Entails Inadmissible Manipulation of the Statute.

In accord with the statutory text and purpose, no court to date has imposed liability under Section 2(c) on an independent broker acting solely for the seller in an open price transaction.

For two decades the decisions applying Section 2(c) have outlawed brokerage commissions paid by the seller to buyers' agents or representatives.[31] Several other 2(c) cases condemned commercial fraud or "dual representation" by an agent surreptitiously acting also for the other side.[32]

[31] *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938); *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F.2d 763 (4th Cir. 1939); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F.2d 393 (1st Cir. 1940); *Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945); *Federal Trade Commission* v. *Herzog*, 150 F.2d 450 (2d Cir. 1945); *Independent Grocers Alliance Distributing Co.* v. *Federal Trade Commission*, 203 F.2d 941 (7th Cir. 1953). These decisions also developed the principle that the exception in Section 2(c) of payments "for services rendered" did not apply to services to the seller by a *buyer's* representative.

The *Oliver* opinion, *supra*, cited in the FTC brief (p. 15), in fact outlawed payments by a seller to a buyer's intermediary, and nowhere alludes to liability for a seller's broker.

[32] *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Freedman* v. *Philadelphia Terminals Auction Co.*, 145 F.Supp. 820 (E.D. Pa. 1956); *Sears, Roebuck & Co.* v. *Blade*, 110 F. Supp. 96 (S.D. Calif. 1953).

As the *A&P* opinion also pointed out, "dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller." 106 F.2d at 674. The opinion continued, "For

But without a single decision going the other way, the opinions of Courts of Appeals for six other Circuits refute the major premise of the Commission's theory, and confirm the Congressional plan that buyers' agents or dummies, not independent seller's brokers and open prices, are the proper province of Section 2(c).[33]

Besides their lack of support in the Act's history and interpretation to date,[34] the Commission's theories

this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent." *Ibid.* Compare FTC Br. p. 16, quoting this sentence without the preceding context.

[33] Besides the Second Circuit's *Biddle* opinion, *supra*, p. 24, see also: "The practice of paying brokerage, or sums in lieu of brokerage, *to buyers or their agents by sellers* was found by Congress to be an unfair trade practice resulting in damage to commerce. Paragraph (c) prohibits such practice." *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667, 678 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940). Similarly, "the statute prohibits payment of brokerage *by the seller to the buyer or his agent* or representative or controlled intermediary." *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 15-16 (6th Cir. 1943). *Accord*: *Webb-Crawford Co. v. Federal Trade Commission*, 109 F.2d 268, 270 (5th Cir. 1940), *cert. denied*, 310 U.S. 638 (1940); *Quality Bakers of America v. Federal Trade Commission*, 114 F.2d 393, 398 (1st Cir. 1940); *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 609 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

[34] The prior "consistent administrative construction" by the FTC (Br. pp. 29 n. 6, 30) is composed of "kickback" charges involving actual receipts and payments of money by a broker to the other side, *e.g.*, *Custom House Packing Corp.*, 43 F. T. C. 164 (1946), or commission receipts by a "broker" who operated as a buyer on the side, *e.g.*, *W. E. Robinson & Co.*, 32 F. T. C. 370 (1941).

The brief also cites (FTC Br. pp. 20-21) a private volume published under the authorship of Mr. Patman two years *after* passage of the statute, whose "discussion can scarcely be termed an objective

entail an inadmissible manipulation of the statutory text.

The Commission's theory for reaching alleged payments by an independent seller's broker cannot overcome the words of Section 2(c). Its brief's theory is that "the broker is the representative of one party to the transaction (the seller), and the buyer is the 'other party' thereto" (Br. p. 14; cf. p. 19); while Congress allegedly "concluded that it was necessary broadly to ban all brokerage payments made by the seller *or his agent* to the buyer" (p. 20). It *might* be argued, to be sure, that the statutory prohibition on illicit payments by "any person" not only covered principal "parties" but also the seller's "representative" or "agent" by silent implication—*if* there were no *express* treatment of "representatives" or "agents." But Section 2(c) expressly specifies those "representatives" or "agents" meant to be covered—*i.e.*, those acting for the party other than the one by whom they are paid. (See text, p. 4, *supra*).

Simply ignoring that portion of Section 2(c),[35] the FTC brief instead interpolates a spurious reference to payments by the seller "or *his* agent" (p. 20)—which

analysis" Book Reviews, 87 U. of Pa. L. Rev. 369, 370 (1939); 13 So. Calif. L. Rev. 533 (1940), particularly with respect to the brokerage provisions, Book Review, 24 A.B.A.J. 323 (1938), and which has been judicially excluded as not a "competent authority" for ascertainment of the legislative intent. *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 154 F.Supp. 471, 485 (N.D. Ill. 1957), *aff'd in part and rev'd in part*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

[35] The brief repeatedly abbreviates Section 2(c) as prohibiting payments by any person to the "other party," without mentioning the illuminating textual references to that *other* party's intermediary (FTC Br. pp. 2, 9, 13, 14, 20).

has no counterpart in the statutory language. The Commission's rationale, unable to muster a shred of legislative or judicial authority, thus hangs on manipulation of Section 2(c)'s text.[36]

The Commission's "indirect payment" theory is equally contrived. Thus, Section 2(c) purportedly "prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, *directly or indirectly,* to the buyer any part of his brokerage" (R. 208). Respondent's acceptance of a lower rate of commission "contemporaneous" with the seller's price reduction, the theory continues, "contitutes a payment of part of their commission to the buyer exactly as though respondents had paid two per cent of their commission to the buyer direct" (R. 209).[37] And while the Commission's opinion shunned the legislative history of 2(c) in favor of Robinson-Patman "climate" (R. 207), its brief quotes excerpts of the legislative reports containing the word "indirect" (FTC Br. pp. 17-18, *cf.* 12, 20, 22).

But the cropped Committee reports do not supply the missing term "indirectly" in Section 2(c) to validate any theory of "indirect" payments to the buyer by the broker's acceptance of a smaller fee. They

[36] Before the Court of Appeals, FTC counsel first contended that "a seller's broker *is* party to the transaction" (Br. p. 27), and then interpolated the spurious word "from" into Section 2(c) (R. 222). Refuting the asserted "broadly" framed text of Section 2(c), the *A&P* decision long ago observed that the Brokerage Clause "deals with one particular subject," and "constitutes a specific prohibition of a specific act." 106 F.2d at 676-677.

[37] By the same reasoning, an increase in the broker's commission coupled with a higher price would presumably be an illicit "indirect payment" of brokerage by the buyer to the broker by way of the seller.

concern solely payments by the seller to a buyer through the buyer's front, the conventional target of the Brokerage Clause. Rather than supporting the FTC theory, they lay bare the attempt, called "realistic reading" (FTC Br. p. 25), to improve on the text enacted by Congress by filling in what the FTC Examiner's report frankly deemed an "omission" of the word "indirect" in Section 2(c) (R. 196, 198).

Such tampering with the text of the statute cannot be countenanced. As this Court's *Simplicity* opinion declared, in a principle governing FTC respondents and FTC alike, "We cannot supply what Congress has studiously omitted." 360 U.S. at 67. Tinkering with the text of a legal prohibition two decades later is particularly invidious when it contrives a "strained construction, and cannot be reconciled with the consistent reading" by everyone concerned for over twenty years. *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 22 (1959).

II.

THE COMMISSION PROVOKES NEEDLESS CONFLICT BETWEEN THE ROBINSON-PATMAN ACT AND THE NATIONAL ANTITRUST POLICY OF FOSTERING COMPETITIVE PRICING FOR THE BENEFIT OF THE CONSUMING PUBLIC.

This final part of our argument details how the FTC's invalid interpretation of Section 2(c), admittedly promotive of "price rigidity and uniformity" (Br. pp. 12, 26), operates to fix and maintain brokers' commissions contrary to antitrust proscriptions enforced by the Antitrust Division of the Department of Justice. The Federal Trade Commission's paradoxical position of policing high brokers' fees not only perverts the design of the Robinson-Patman Act, but flouts this Court's *Automatic Canteen* formula to

"reconcile" that statute with "broader antitrust policies." 346 U. S. at 74. Nor can belated rationalizations concerning "small retailers" prejudiced by an alleged "serious loophole" condone an unprecedented departure from Section 2(c) benefiting the organized brokers at the expense of the public.

(1) The Commission's Theory Fixes and Maintains the Level of Brokerage Commissions Contrary to Antitrust Proscriptions.

The inevitable consequence of the theory advocated by the FTC is to chill price bargaining and freeze brokerage fees into law at artificially high levels.

The heart of the Commission's case is that the Robinson-Patman Act shelters brokers' fees from downward adjustment in the course of competitive price bargaining. For in the FTC's conception of Section 2(c), a seller's price reduction reflecting savings in legitimate brokers' commissions is *per se* prohibited as an "allowance in lieu of" brokerage (Br. p. 27). Once a broker enters the distribution picture, a seller may neither reduce the broker's fee nor cut out his services entirely to achieve marketing economies translated into a lower price. Like so-called "Fair Trade" guaranteeing a retailer's profit "margin," the broker's commission would be "maintained" under penalty of law.

From the viewpoint of brokers as a class, their commission rates would then enjoy a privileged legal sanctuary monitored and policed through the FTC. And, as illustrated by the nasty correspondence of Phipps, the broker who lost the Smucker sale (pp. 8-9, *supra*), Section 2(c) would serve as a bludgeon to coerce buyers

and sellers any time their competitive price bargaining imperiled a broker's accustomed fee.[38]

Yet comparable mechanisms to fix and maintain commissions in other areas of the economy have been rigorously prosecuted as illegal restraints of trade under the Sherman Act.[39] Stabilization of brokers' commissions was featured in the notorious Sugar Institute code, outlawed in *United States* v. *Sugar Institute*, 15 F. Supp. 817, 840-41 (S. D. N. Y. 1934), *aff'd*, 297 U. S. 553, 587-88 (1936). And such restraints stand con-

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[38] Respondent's rival Phipps in identifying the "feather in somebody's cap" talked about being "found out by any member of the National Brokerage Association that wanted to have a gripe" (R. 44). And the former Chief Economist of the FTC has pointedly noted "the zeal of the National Association of Food Brokers in bringing violations of this section of the act to the commission's attention." Corwin D. Edwards, Twenty Years of the Robinson-Patman Act, 29 J. Bus. U. of Chi. 149, 151-152 (1956).

See also recent Congressional testimony by the National Food Brokers Ass'n, enjoined from collusive restraints on competition, note 48, *infra:* "We have been active in this Robinson-Patman work. Food brokers are an active bunch of people. They have to be in order to remain in this highly competitive business. It isn't hurting us. We don't want to see the FTC hurt. We think there is a great need for that agency. For that information we are still working very closely with them. We will continue to do so. They have not hurt us one bit." Statement of Watson D. Rogers, in Hearings before the Select Committee on Small Business, House of Representatives, on Price Discrimination, The Robinson-Patman Act and Related Matters, 84th Cong., 1st Sess. 422 (1955).

[39] *E.g.*, *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485 (1950); *United States* v. *American Ass'n of Advertising Agencies, Inc.*, 1956 CCH Trade Cases par. 68, 252 (S. D. N. Y. 1956). Restraints which operate on prices, the "central nervous system of the economy," are illegal whether pursued by "horizontal" conspiracy among distributors or by "vertical" restrictions. *E.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226 n. 59 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

demned whether "accomplished by express contract or by some more subtle means," *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 310 (1956), for "Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 489 (1950).

As the court below aptly observed, "Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position" (R. 224).[40]

(2) The Commission's Theory Defeats the Legislative Design of the Robinson-Patman Law and Mocks This Court's Directive to Reconcile the Act With National Antitrust Policy.

By extending the "absolute" bans of Section 2(c) so as to maintain the level of brokers' commissions, the FTC disrupts the Congressional design of the Robinson-Patman Act.

The 1936 Robinson-Patman amendments codify a Congressional objective to nip destructive discriminatory practices without paralyzing the price flexibility essential to a free economy. The original Patman bill in 1935, introduced two weeks after *Schechter* eviscerated the Blue Eagle of NRA,[41] outlawed all price discrimination irrespective of competitive effects and the necessity of sellers to meet competition,

[40] *E.g., Food & Grocery Bureau* v. *United States*, 139 F. 2d 973 (9th Cir. 1943); *California Retail Grocers & Merchants Ass'n* v. *United States*, 139 F. 2d 978 (9th Cir. 1943), *cert. denied*, 322 U. S. 729 (1944); *National Food Brokers Ass'n*, 52 F. T. C. 372 (1955).

[41] *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). The genesis of the Robinson-Patman amendments and the so-called Fair Trade laws in the wake of NRA is traced in a Harvard Political Study, Palamountain, The Politics of Distribution cc. VII-VIII (Harv. Univ. Press 1955).

as well as prohibiting "dummy" brokerage and "pseudo-advertising allowances." But Congress modified the bill to ban solely those "unjustified" price differentials inimical to competition. Only the prohibition on "false" brokerage and promotional arrangements was left "absolute," in order to discourage concealed price variations and to force price differentials out "into the open." *Cf. Simplicity* opinion, 360 U. S. at 68 n. 13.

Under the Commission's theory, the open price reductions made possible by "more economical processes" which Congress wished to preserve, *id.* at 71 n. 18, would become "absolutely" illegal under the Brokerage Clause. Wherever brokers operate, all price adjustments, unless they guaranteed the broker's commission, would face legal jeopardy—notwithstanding the repeated assurances that the law "will in no way shelter or protect brokers" (Patman, 80 Cong. Rec. 7760), "does not affect legitimate brokerage" (Logan, *id.* at 6281), and that "There is nothing in the bill that requires the employment of a broker" (Utterback, *id.* at 9418). See also *id.* at 3118, 7759, 7886.

The Federal Trade Commission's doctrine, which admittedly promotes "price rigidity and uniformity" at least in the "short run" (FTC Br. pp. 12, 26), surely flouts this Court's admonitions to ensure a harmonious national antitrust policy.

In the *Automatic Canteen* decision of 1953, this Court set aside a Robinson-Patman interpretation by the Commission which fostered "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U. S. 61, 63 (1953). The

Commission's theory was disapproved "in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." *Id.* at 73-74. The Court noted that "Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes," *id.* at 72 n. 11, and stressed a "duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Id.* at 73-74.[42]

And in the analogous Fair Trade field of resale price maintenance, this Court's *McKesson & Robbins* decision confirmed that "Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." 351 U. S. 305, 316 (1956).

(3) Belated Rationalization on Behalf of the "Small Retailer" Cannot Condone Subordination of the Public Interest in a Competitive Economy for the Real Benefit of Another Private Business Class.

The afterthought argument that the Commission's theory is essential to protect "small retailers" and "small merchants" prejudiced by a purported "serious loophole" in favor of "large buyers" (FTC Br. pp. 11, 12-13, 21, 25-27), misstates the import of the deci-

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[42] The Second Circuit recently also set aside the Commission's "radical departure from prior applications" of Section 2(d), where "any allowance given on the first sale could never be adjusted to meet competition. Such a rigid application of Section 2(d) would stifle rather than encourage competition and have the practical effect of outlawing all promotional allowances." *Atalanta Trading Corp. v. Federal Trade Commission*, 258 F. 2d 365, 368, 371 (2d Cir. 1958).

sion below, and defeats the interest of the public in competitive food distribution.[43]

To begin with, the decision below creates no "serious loophole" and bestows no legal dispensations on so-called "large buyers." While the FTC brief proclaims that "the holding of the court below would permit a large buyer to demand and receive from a seller's broker a substantial direct rebate of part of the latter's commission" (Br. p. 21), that decision neither considers nor concerns any demands or receipts by buyers, "large" *or* small, of "rebates" of "part" or all of a broker's commission, "direct" *or* indirect, "substantial" or not.[44] On the contrary, the Court of Appeals stressed that "Neither in substance nor in fact, directly or indirectly, did Broch pay anything to Smucker" (R. 224), and that here the buyer did "not

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[43] The Commission's brief below asserted that "Where Congress has imposed specific prohibitions by enactment of the Robinson-Patman Act, there is no room for conjecture as to how enforcement of that Act might redound to the disadvantage of the public" (FTC Br. p. 38). The present claim that the "public interest" is not a component of a Clayton Act proceeding (Br. p. 28 n. 9) is contradicted by the Commission's "policy as to private controversies," codified in its Revised Rules of Practice, 16 Code Fed. Regs. § 1.21 (Supp. 1959), which declares that the "Commission acts only in the public interest, against alleged unfair methods of competition or unfair, deceptive or monopolistic practices," and "does not take action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public."

[44] Such activities were indeed held illegal by the court below in *Independent Grocers Alliance Distributing Co. v. Federal Trade Commission*, 203 F. 2d 941 (7th Cir. 1953); *Modern Marketing Service, Inc. v. Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945).

suggest or even know of the reduction in the seller's brokerage commission" (R. 223).[45]

In short, nothing in the decision below exempts discriminatory exactions by buyers from Section 2(c)'s ban on illicit brokerage concessions, or Section 2(f)'s prohibition on discriminatory price receipts.

Since furthermore the nefarious maneuvers purportedly approved by the decision below one year ago are *today* being successfully enjoined by the Commission, the "serious loophole" in the law painted by the FTC brief has up till now defied detection.[46] Quite unembarrassed by that decision, the Commission has just

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[45] Moreover, the buyer paid the seller's invoice price, *i.e.*, there was no double bookkeeping by the broker which would permit the buyer to pay less than the seller had quoted to the broker (cf. FTC Br. p .22).

[46] The "loophole" assertion was documented in the FTC petition with such authorities as the Texas Food Merchant and the Food Field Reporter (Pet. 6 n. 4). Since the judgment below, the Commission has launched at least eight formal complaints attacking illicit brokerage payments to the buyer by the seller or his broker, *Bill the Distributor, Inc.*, Dkt. 7379 (Jan. 27, 1959); *Minute Maid Corp.*, Dkt. 7517 (June 11, 1959); *Hadid Brokerage Co.*, Dkt. 7518 (June 11, 1959); *D. L. Piazza Co.*, Dkt. 7519 (June 11, 1959); *Eagan, Fickett & Co.*, Dkt. 7520 (June 11, 1959); *Kadiak Fisheries Co.*, Dkt. 7562 (Aug. 6, 1959); *Southern Fruit Distributors, Inc.*, Dkt. 7566 (Aug. 7, 1959); *Smith Grain Co.*, Dkt. 7641 (Nov. 18, 1959). In the same months, twelve respondents in at least four additional formal proceedings voluntarily accepted FTC orders to cease and desist—from the very conduct said to be approved by the Court of Appeals. *Puget Sound Brokerage Co., et al.*, Dkt. 7151 (Feb. 17, 1959); *Parks Canning Co., et al.*, Dkt. 7200 (Feb. 12, 1959); *E. H. Hamlin Associates, et al.*, Dkt. 7204 (Feb. 12, 1959); *Emard Packing Co., et al.*, Dkt. 7249 (Feb. 12, 1959).

warned "powerful food buyers" of a reinvigorated enforcement campaign against illegal exactions.[47]

More important than its bloated representation of the holding below, the Commission's solicitude for "small merchants" under the Brokerage Clause is a paradox (FTC Br. pp. 20-22). The first victim of that concern is this respondent, a "small merchant" with a desk-and-telephone partnership, whose competitive operations the Commission's theory would squelch. The "feather in somebody's cap" (R. 44) from such perverse 2(c) enforcement rather belongs to the organized food brokers who crave a privileged monopoly for their commission rates under the aegis of the FTC. In realistic perspective, the "small merchant" rationalization subordinates the paramount public interest in a competitive economy to the private advantage of a special class allergic to the competition other businessmen must face.[48]

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[47] Legal Obligation of Powerful Food Buyers, Statement by FTC Chairman Kintner before National Ass'n of Food Chains, p. 8 (FTC Mimeo. Oct. 19, 1959).

[48] The application of Section 2(c) advocated here, the Federal Trade Commission's former Chief Economist has written, "goes far to give such brokers a legally supported monopoly of distribution in the lines in which they are already well established." Corwin D. Edwards, Maintaining Competition 169 (McGraw-Hill 1949). See also Fulda, Food Distribution in the United States, 99 U. Pa. L. Rev. 1051, 1101 (1951). Cf. *National Food Brokers Ass'n*, 52 F. T. C. 372 (1955) charging and enjoining restrictions on competition and the coercion of non-conformists by the organized brokers as unlawful "agreements, understandings, combination and planned common course of action * * * to the prejudice and injury of the public." *Id.* at 380. See also notes 3, 4, 38, 40, *supra*; 49, *infra*.

If there is any moral in the history of cartels and collusion sheltered by agencies of the State, it is that "small merchants" hold no patent on virtue. And in this day and age, the so-called "big buyer" is surely an outworn forensic ogre. As this Court once before wrote in a Robinson-Patman case, "To decide issues of law on the size of the person who gets advantage or claims disadvantage is treacherous." *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 753 (1947).

At stake now is not the private rights of merchants, large or small, but the interest of the consuming public. For, in the perceptive statement of the decision below:

> "Obviously an important element in the cost of food distribution is the commission paid by sellers to their brokers. If a seller is to be forbidden to meet competition by reducing an item in its cost of distribution, then to that extent his costs are frozen without regard for the welfare of the public which must ultimately defray the resultant costs of distribution" (R. 224).

CONCLUSION

When an agency chartered by Congress to promote competition and to protect the consumer sets out—with undoubted earnestness and purity of purpose—to frustrate this paramount objective for the inevitable benefit of a special business class, the malaise of the regulatory commissions goes deep indeed.[69]

For all of the preceding reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[69] See Editorial, "The Regulatory Commissions," New York Times, Sept. 30, 1959, p. 36.

With respect to the National Association of Retail Grocers, whose brief *amicus curiae* adds color rather than light, see Palamountain, The Politics of Distribution, 201-203, 232-33 (Harv. Univ. Press 1955); cf. Adelman Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1336 (1948).

The National Food Brokers Association (NFBA) has not filed an appearance or brief. But "NFBA is watching closely developments in the *Broch* case. * * * NFBA is conferring with FTC officials to get their reaction to the case, and the next step to be taken." NFBA News, Dec. 26, 1958, p. 2. Also "NFBA has discussed this case with all of the FTC Commissioners. They all realize the danger in the Appellate Court's decision. They state that their present feeling is that they will recommend an appeal to the Supreme Court." NFBA News, Jan. 8, 1959, p. 1.

LEGISLATIVE HISTORY OF
SECTION 2(c) OF THE CLAYTON ACT
AS AMENDED BY THE ROBINSON-PATMAN ACT

Legislative History of Section 2(c) of the Clayton Act as Amended by the Robinson-Patman Act

COMMITTEE REPORTS

HOUSE COMMITTEE REPORT

Report of the House Judiciary Committee. H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936):

Section (b) deals with the abuse of the brokerage function for purposes of oppressive discrimination. The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. In either case he discharges functions which must otherwise be performed by the parties themselves through their own selling or buying departments, with their respective attendant costs. Which method is chosen depends presumptively upon which is found more economical in the particular case; but whichever method is chosen, its cost is the necessary and natural cost of a business function which cannot be escaped. It is for this reason that, when free of the coercive influence or mass buying power, discounts in lieu of brokerage are not usually accorded to buyers who deal with the seller direct since such sales must bear instead their appropriate share of the seller's own selling cost.

Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest.

Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker", so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller would render the section a nullity. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume.

Section (b) permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf: Likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other. H. R. Rep. at 14-15.

SENATE COMMITTEE REPORT

Report of the Senate Judiciary Committee, S. Rep. No. 1502, 74th Cong., 2d Sess. (1936):

In section (b) the phrases "or any allowance or discount in lieu thereof", and "either to the other party to such transaction" are added by your committee's recommendation. As so revised, this section forbids the payment or allowance of brokerage either to the other principal party, or to an intermediary acting in fact for or under the

control of the other principal party, to the purchase and sale transaction.

Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a "broker", so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume. S. Rep. at 7.

CONFERENCE COMMITTEE REPORT

Conference Committee Report, H.R. Rep. No. 2951, 74th Cong., 2d Sess. (1936):

Subsection (c) deals with brokerage. It is the same as subsection (b) in the House bill, which in turn is the same as subsection (c) in the Senate amendment, except that the words "except for services rendered", as contained in the House bill, do not appear in the Senate amendment. In the conference report these words are retained, so that, with adjacent language, it reads:

> * * * any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise, * * *

With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other. Conf. Rep. at 7.

DEBATES

Representative Wright Patman, Co-author of the Robinson-Patman Act:

Patman

Question. What specific provisions are included in this bill?

Answer. First. Advertising allowances. * * * Second. Dummy brokerage. A practice has grown up whereby large mass buyers bribe representatives of the seller, oftentimes the seller representing groups of farmers, under the guise of a brokerage allowance. It is not a brokerage allowance at all; it is a bribe. This bill will not compel the use of a broker but it will prohibit one party from bribing the representative of the other under the guise of brokerage allowances or commissions. 80 Cong. Rec. 7759-60 (May 21, 1936).

* * * * *

Patman

Question. After these amendments have been adopted, what essential provisions will be contained in the bill?

Answer. What the sponsors first proposed and are now insisting upon, that is, an effective law against pseudo-advertising allowances, dummy brokerage allowances, quantity discounts in excess of differences in cost of manufacture and distribution, and authority granted to the Federal Trade Commisison to fix quantity limits to prevent monopoly. 80 Cong. Rec. 7760 (May 21, 1936).

* * * * *

Patman

Question. Will this law build a fence around brokers and wholesalers, grant them a bonus or subsidy, or benefit them in any way?

Answer. This law will in no way shelter or protect brokers and wholesalers. It will benefit them to the extent only that they are able to render a service at equal or lower costs than anyone else. This law will not compel a broker or wholesaler to be used. Sales may be made directly from a manufacturer to the retailer or to consumers, but if brokerage or wholesale allowances are paid, they must be paid for services rendered and not used as a bribe. 80 Cong. Rec. 7760 (May 21, 1936).

* * * * *

Patman

Question. Is there anything in this bill that will require middlemen to be used?

Answer. Absolutely nothing. The only provision about brokers and wholesalers will merely prevent fees and commissions ordinarily paid to brokers and wholesalers from being used as bribes. 80 Cong. Rec. 7886 (May 25, 1936).

* * * * *

Patman

One great concern in America last year compelled manufacturers to pay it $8,000,000 in pseudo-advertising allow-

ances and pseudo-brokerage charges. That amount of benefits the independent merchants of the country were not entitled to receive from the same manufacturers, purchasing the same quantity under the same conditions. You are in favor of giving the citizens the same right as the corporations in this country, and that is all that we are asking in this bill.

Mr. Cox. Mr. Chairman, will the gentleman yield?

Mr. Patman. Yes.

Mr. Cox. For an observation. In effect that practically forces the independent buyer to provide the fund that goes by way of rebate and advertising to the big buyer, giving him an advantage.

Farmer Representatives from New York City

Mr. Patman. That is right, giving him an advantage in that way. Another is this dummy brokerage. Let me tell you something about the farmers. You hear talk about saving the farmers. Are we going to have to go to the heart of New York City and get Congressman Celler and Congressman Peyser and Congressman Bloom to come down here and speak for the farmers of this country? They are the principal opponents of this bill. They appeared before the Rules Committee in opposition to a rule. In the investigation we discovered the corporate chains were strong enough to use a few farmers as a front, or a stuffed shirt, as the mouthpiece for them. The investigation disclosed that, and the officials of the chain stores were so pleased with it that they referred to them as the "cornstalk brigade." So I guess Congressman Celler and Congressman Bloom and Congressman Peyser would like to have the use of another cornstalk brigade here before Congress. They are not going to fool the farmers or the representatives of the farmers.

DUMMY BROKERAGE

Take this dummy-brokerage allowance.

There is a merchant in Virginia representing potato growers. He sells thousands of cars of potatoes a year, and our investigation has disclosed that he had a secret contract with a large mass corporate chain buyer by which he obligated himself to sell every car of those potatoes of those farmers to this large buyer. At what price? Oh, at the market price. That sounds good, but fortunately for the large mass buyer, he was big enough to make the market price. They do make the market in those localities. This man representing the farmers sold those potatoes to that mass buyer, fixing the price himself, and what did he get out of it? He got a secret rebate of \$2.50 to \$5 on every car that the farmers knew nothing about, and the trade was, "If I don't deliver you every car, for every car that I do not deliver you I will be penalized \$5." That is the kind of dummy-brokerage arrangement we are trying to prohibit in this bill.

This is a bill to protect the farmers of this country, I say to my distinguished friends from the heart of New York where holders of privilege reside. I heard one witness before the Rules Committee say that 90 percent of the people affected by this bill live in two congressional districts in New York City. I do not take issue with that statement. I believe it is absolutely true, that 90 percent of them live in those two congressional districts. What are they asking for? They are asking these special rights and privileges and benefits that they are not entitled to enjoy as a matter of right and justice be continued. How? By openly fighting? The representatives of the special interests will not openly fight them, but you will never get a bill that they will favor. There is something wrong with every bill that is presented. We are trying to prevent the dummy brokerage, prohibit a man from doing something for hire against the interest of the person that he is supposed to represent. 80 Cong. Rec. 8111-12 (May 27, 1936).

* * * * *

Patman

In this bill, Mr. Chairman, we are asking for those main points, to eliminate these pseudo-advertising allowances given only for the purpose of favoring the large corporate chains. We are asking that the dummy brokerage be eliminated to the extent that it cannot be used as a bribe to make one person go back upon the person who employed him and betray him. That is, if you are against deceit and trickery and treachery, you certainly ought to be against this dummy brokerage. 80 Cong. Rec. 8112 (May 27, 1936).

Senator M. M. Logan, Chairman of Senate Judiciary Subcommittee considering the Robinson-Patman amendments of the Clayton Act and Senate Manager of the bill:

Logan

Now, turning to the provisions of the bill that seek more definitely to accomplish the purpose intended, I desire to refer to subparagraph (b) relating to rebates, or payments as a commission, brokerage, or other compensation, or any allowance in lieu thereof, in connection with the sale or purchase of goods, wares, or merchandise, either to the party to such transaction, or to an agent, representative, or other intermediary therein, where such intermediary is acting in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is paid.

The Clayton Act was intended to prevent discrimination in prices where such discrimination tended to create a monopoly. This bill forbids the payment or allowance of brokerage either to the other principal party, or to an intermediary acting in fact for or under the control of the other principal party to the purchase and sale transaction.

This is one of the most prevalent schemes to evade the provisions of the law. Some large buyers demand the allowance of brokerage direct to them on the purchases which they make, or the payment of such brokerage to some intermediary of such a buyer who is an employee, agent,

or corporate subsidiary for the buyer which has been set up in the guise of a broker, and through which they require that sales to them must be made.

The legitimate broker has an important place in trade, and it is not intended to interfere at all with his legitimate business. Where he is employed by the buyer in the field to find a source of supply, or by the seller to find a market, he is discharging a sound and reasonable function, and is entitled to appropriate compensation by the one he serves. It is an entirely different thing, however, to allow payment or allowance under the guise of brokerage where no such service is rendered, and where the supposed broker is only a dummy pointed out by the buyer to the seller, rather than one who brings the buyer to the seller. This scheme corrupts a legitimate function to the purposes of competitive discrimination. The relationship existing between a broker and his client is fiduciary. To allow a broker to collect from a client for services rendered to the adverse party is a violation of that relationship. Such rebates, fostered by schemes under the guise of brokerage, for the sole purpose of bringing about unfair discriminations, should not be allowed, and are prohibited by this bill. 80 Cong. Rec. 3114 (March 3, 1936).

* * * * *

Logan

Mr. Logan. * * * One of the favorite methods is what is known as the brokerage scheme. If some buyer goes to a seller desiring to buy a large quantity of goods, he may say to him, "You must sell through this broker over here", who is an employee of the buyer; "and you must pay him brokerage", which the seller does, to his loss. The supposed broker turns the brokerage over to the buyer, and in that way it amounts to a rebate on the price of the goods which were purchased, and, of course, it enhances the profits of the buyer.

Mr. George. What I wanted to get perfectly clear, if I could, was whether the same prohibitions relate to both the giver and the taker of a rebate in any form.

Mr. Logan. The prohibition is against its being done at all, and, of course, it would apply to the giver as well as to

the taker, although there is no criminal penalty provided. 80 Cong. Rec. 3114-15 (March 3, 1936).

* * * * *

Logan

Mr. George. I beg the Senator's pardon for interrupting his presentation. I had the impression that the bill did impose penalties on the giver of a rebate, and I wanted to know whether it imposed like prohibitions, or penalties, or whatever the bill provides, on the taker.

Mr. Logan. The bill prohibits the act, and that prohibition would extend alike to all who are affected by it.

Mr. George. Both to the giver and to the taker, of course?

Mr. Logan. Yes; that is true. 80 Cong. Rec. 3115 (March 3, 1936).

* * * * *

Logan

Mr. Gore. I was a member of the Committee on Interstate Commerce which prepared the Clayton Act, and was very much interested in section 2, and the abuses which it sought to correct.

Mr. Logan. Let me tell what happened. The section of the act to which the Senator has referred was evaded by able lawyers representing those who controlled large purchasing power. One of the first schemes was to set up what they called a brokerage system, and compel a seller to use the services of a broker, who may have been an employee, who at least was under the control of the buyer, or it may have been some subsidiary corporation of the buyer.

One large chain received last year \$6,000,000 or \$8,000,000 in brokerage fees. The bill attempts to prohibit that scheme. That is one of the most important things it seeks to do. It does not interfere with legitimate brokerage, but it makes it an unfair discrimination to grant such a brokerage in the nature of a rebate to one and

not grant it to another. 80 Cong. Rec. 3116 (March 3, 1936).

* * * * *

Logan

Among the many statements I have received sent out by those opposing the enactment of Senate bill 3154 is one the title of which is "Twenty-eight Questions That Suggest a Million Others." The 28 questions submitted are ridiculous in the extreme, and show that the organization that sent out the questions either does not know what the bill contains or has no regard for truth. I wonder at times how long it will be until some organizations find that the people are wiser than they ever thought them to be. One of the first questions in the pamphlet I have mentioned undertakes to suggest that brokerage must be allowed to none or all. The bill has nothing to do with brokerage at all. The bill deals with schemes and shams used to bring about discriminations in prices.

It is suggested in the first question submitted that a mine paying a broker $50 a car must charge every other consumer $50. That is not true. A legitimate broker can charge whatever his employer may be willing to pay without the violation of any provisions of the proposed act. 80 Cong. Rec. 3118 (March 3, 1936).

* * * * *

Logan

I shall now speak of the matter of brokerage. Let me say in the beginning that the bill does not affect legitimate brokerage either directly or indirectly. Where the broker renders service to the buyer or to the seller the bill does not prohibit the payment of brokerage. It is not aimed at the legitimate practice of brokerage, because brokerage is necessary. The broker has a field all his own and he should not be interfered with. In order to evade the provisions of the Clayton Act, however, it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, "That is my broker." Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the

purpose. However, the buyer would say to the seller, "You must sell through that man, and you must pay him a certain percentage or amount of brokerage"; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about.

I undertake to say in this august body that there is not a Member of the Senate, there is not a Member of the House, who will not at once condemn a practice of that kind, which provides secret rebates under the guise of brokerage. 80 Cong. Rec. 6281 (April 28, 1936).

* * * * *

Logan

The first thing which the Robinson bill does—and it represents about one-third of the bill—is to provide that no buyer shall engage in this trick brokerage practice whereby a rebate may be made by the seller. Under the provisions of the bill no payment may be made to a man acting as a broker unless he actually is a broker. Is there anyone in the whole country, from one end of the Nation to the other, who will not heartily approve of the provisions of the bill aimed at fraudulent practices like that which tend toward the destruction of the small man and also tend toward the destruction of the seller himself in many instances? Should not such practices be prevented, if we can prevent them? That is the first thing in the bill. 80 Cong. Rec. 6282 (April 28, 1936).

* * * * *

Logan

In the second section of the committee amendment there is a provision that in making discriminations or differentials, or whatever we may choose to call them, all costs other than brokerage shall be allowed; and it has been said that the words "other than brokerage" in that section ought to go out.

I have thought a good deal about that suggestion. I think perhaps legitimate brokerage ought to be allowed

as a part of the costs; and I think when the bill was drafted —I did not write the bill—perhaps in the amendment which was inserted by the Judiciary Committee of the Senate we had in mind dummy brokerage, sham brokerage. It may be that something should be done about that. I call it to the attention of the Senate, so that some of the other Senators may consider it. 80 Cong. Rec. 6285 (April 28, 1936).

Representative Hubert Utterback, Chairman of the Senate-House Conference Committee:

Utterback

The bill prohibits payment or allowance of brokerage or commission except for services rendered. As explained more fully in the report of the House Committee on the Judiciary, this refers to true brokerage services rendered in fact for the party who pays for them, whether he be an agent employed and paid by the seller to find market outlets or one employed and paid by the buyer to find sources of supply. As the bill further enumerates, it prohibits the payment or allowance of commissions or brokerage on the purchase or sale of goods either to the other party to the transaction or to an intermediary who is acting in fact for or under the control of the other party to the transaction; that is, the party other than the one who pays the commission or brokerage in question. There is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer. But if an intermediary is employed, and is in fact acting for or under the control of the buyer, then the seller cannot pay him. Or if he is acting for or under the control of the seller, then the buyer cannot pay him. And where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by either party to the other. 80 Cong. Rec. 9418 (June 15, 1936).

COMMITTEE HEARINGS

H. B. Teegarden, counsel of the U. S. Wholesale Grocers Association, presented to the House Judiciary Committee by Representative Patman as the draftsman of the Patman bill and the expert as to its meaning. Hearings before the House Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st & 2d Sess. 9, 13 (1935-36):

Teegarden

Mr. McLaughlin. Mr. Teegarden, I think this is a fair question: How do you propose, legislatively, to offset the advantages which have been recited here, which the chain stores have over the independents?

Mr. Teegarden. I can answer that by an analysis of the bill itself and of its various provisions, to which I shall immediately proceed.

This bill is drawn in 4 sections, 3 of which constitute substantive law and the fourth provides the remedy. Sections (a),(b), and (c) are directed, respectively, at unreasonable quantity discounts, at dummy-brokerage allowances, and pseudo-advertising allowances. It is drawn in this form because those are the three methods under which price concessions and discriminations granted to buying organizations are principally practiced in the experience of the trade. Hearings at 16.

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Teegarden

Question. Why does the bill pick out quantity prices, brokerage and advertising allowances for suppression?

Answer. Because these are the three favorite disguises under which large buyers wring their exactions. Hearings at 31.

* * * * *

Teegarden

QUESTION. Does the proposed amendment prohibit the payment of brokerage to companies whose stock is owned by corporate chains or wholesale grocers?

ANSWER. No; not by reason of such stock ownership alone. If it is owned for investment purposes only and the brokerage concern is left independent and free from control in the conduct of its business, that relationship is not disturbed. It prohibits payment of brokerage only to brokers who are in fact acting for or under the control of parties to the sale other than those who pay the brokerage * * * * Hearings at 37.

* * * * *

Teegarden

MR. TEEGARDEN. I want to cover sections 2-B and 2-C briefly. Section 2-B relates to brokerage. It has been charged that Section 2-B prevents a merchant from owning stock in a brokerage concern, prevents the conduct of a brokerage business; that it compels the payment of brokerage or compels the employment of a broker in all sales between manufacturers and wholesalers or retailers; that it would compel A and B to employ private brokers instead of purchasing through its own subsidiary brokerage company.

It does none of these. It does one thing and one thing only. It leaves anyone free to select his broker or dispense with his services as he sees fit.

It provides, however, that if a broker enters into the picture, then he must be paid, if he is paid at all, by the party for whom he is really acting. It prohibits the payment of brokerage to an intermediary by any party to the transaction other than the one for whom the service is rendered. * * *

It simply prohibits a broker taking pay from one party for service rendered in fact to the other, and it would meet the evil where large buyers let it be known to manufac-

turers that they will not purchase except through their own subsidiary brokerage concerns.

Brokerage, you know, is a distinct economic function in itself. Every seller faces the problem of finding a market. Every buyer faces the problem of finding a source of supply. Either of them can do it by maintaining their own selling or their own buying departments with a consequent cost; or, if they find it more economical, they can engage a private independent contractor who makes it a business to keep his contacts with various sources of supply in various markets. And where that function is performed brokerage is proper.

But where A. & P. or another firm comes up to a manufacturer's door and says, "Here I am, a large buyer", that manufacturer does not need to engage a broker to find him a market. The brokerage function is not present there. And when A. & P. says "I will buy from you if you sell me through my brokerage concern and pay the brokerage which I will drain off in dividends", the brokerage function is being prostituted for the reaping of an unfair price concession. That is what it amounts to. That is the evil which this brokerage clause would prohibit. Hearings at 217-18.

* * * * *

Teegarden

* * * where, regardless of the form of the transaction, the broker is in fact acting for or under the control of any party to the sale other than the one who pays him, he is prohibited by the Robinson-Patman bill from receiving brokerage on that transaction. Hearings at 226.

* * * * *

Teegarden

The factual data presented before the committee amply establish that these evils are prevalently found:

(1) [excessive quantity discounts]

(2) In the payment of brokerage by the seller to dummy brokerage concerns owned and controlled by large buyers and serving the latter's interest.

(3) [disproportionate promotional payments].

It is in these three fields, accordingly, that the Patman bill visits its restrictions; and to them those restrictions are carefully limited, leaving full latitude:

(1) For differentials in prices or terms wherever they furnish an apt vehicle for the transmission of real comparative economies through the channels of distribution to the ultimate consumer;

(2) In the payment of brokerage wherever the brokerage function offers a real economic service, and where it is paid by the one who really benefits from that service, to the one who actually renders it in his behalf. * * * Hearings at 247.

* * * * *

Teegarden

* * * Brokerage is in itself a separate and distinct economic function, which may be utilized either by buyer or seller. Every seller has the problem of finding a market, every buyer a source of supply. This he may do through his own employees, with its natural resulting cost to him; or, where he finds it more economical, he may engage an independent agency, which makes it a business to keep widely informed in such matters, and which he compensates for its services on a commission basis. As such, he substitutes it for a function which he would otherwise perform himself, either personally or through his employees, and with equal propriety bears its costs.

The evil here in view arises from the practice of certain powerful buyers in setting up subsidiary brokerage concerns of their own, then informing their source of supply that the latter cannot hope to sell to them, unless they engage this brokerage concern for that purpose and pay it the usual brokerage. Regardless of name or form, such a concern necessarily acts in the interest of its parent buyer, to whom it also turns over its brokerage in the form of dividends or net proceeds after meeting its expenses. Thus, just as through advertising allowances large buyers are

able to saddle on to the manufacturer those advertising costs which their competitors must bear themselves; so through this dummy brokerage device they also manage to saddle off a good portion of their buying costs, which their competitors must also meet out of their own resources.

Section b. of the Patman bill, prohibits the payment of such brokerage wherever the broker is in fact acting for or under the control of the seller, instead of the buyer who pays him. If, in any case, the situation were reversed it would equally forbid a subsidiary brokerage concern maintained by the seller from collecting brokerage from the buyer. It leaves it a question of fact to be determined in each case, whether the broker "is acting therein for or on behalf, or is subject to the direct or indirect control" of parties to the sale other than those who pay him; and that question of fact depends naturally upon matters of evidence, such as percentage of stock control, character of the other stockholders, common officers or directors, the actual machinery of intercorporate operation, and the provisions of the express contract, if any exists. Hearings at 258-59.

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No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1959

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Respondent's primary contention is that the legislative history of Section 2(c) of the Clayton Act shows that Congress was concerned in that section with the use of dummy or fictitious brokers as a device for evading the price-discrimination prohibitions of Sec-

tion 2(a); and that the broad language of Section 2(c) should, therefore, be construed to cover only the precise evils which Congress had before it. Specifically, it would read into the prohibition in Section 2(c) on "any person * * * grant[ing] * * * any allowance or discount in lieu" of brokerage, the following qualifications: (1) "any person" means only a seller, not a seller's broker; and (2) "any allowance or discount in lieu" of brokerage means only an allowance or discount in lieu of "illegal" brokerage, *i.e.*, secret or fictitious brokerage.[1]

"But we deal here with remedial legislation whose language should be given hospitable scope" and not "read * * * narrowly" (*Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 26). Furthermore, "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in par-

[1] Throughout its brief, respondent repeatedly asserts (*e.g.*, pp. 2, 3, 15, 16, 19, 23-24, 27, 28, 32-33, 34) that the prohibitions of Section 2(c) apply only to "secret" discriminations and not to the "open" price reductions here involved. But Canada Food's discriminatory price reductions to Smucker were not "open" in the sense that they were generally known to Smucker's competitors or to the trade in the same way, for example, as a published quantity discount schedule. Discriminatory price reductions given directly to favored buyers are ordinarily kept just as confidential by both the giver and the recipient as when they are accomplished by fictitious or dummy brokerage. Indeed, after the other broker (Phipps) lost the Smucker sale to respondent, he wrote to the seller asking: "All we want to know is that your price quoted to other brokers was the same as that given to us" (R. 122). The seller did not answer the inquiry (R. 139-140). Thus, the price reductions in this case were "open" only in the sense that, if the Commission conducted an investigation, the fact that they had been given would appear on the face of the books and records of the participating parties.

ticular cases the generally expressed legislative policy" (*Securities and Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344, 350-351). The detailed provisions of Section 2(c), therefore, must be read in the light of the basic overall Congressional purpose and design in enacting the Robinson-Patman amendments to the Clayton Act, and not just the particular evils disclosed with respect to brokerage.

One thread that runs through the entire legislative history of the Robinson-Patman amendments is the fundamental concern of Congress generally to prevent distributive practices by which a large buyer would be able, solely as a result of greater purchasing power, to gain a competitive advantage over smaller buyers. For this was the basic flaw in Section 2(a) of the original Clayton Act. Despite that section's ban on price discriminations, large buyers continued to obtain "[c]omparable competitive advantages * * * in several [other] ways", such as obtaining rebates for fictitious brokerage services, receiving "[a]dvertising allowances * * * for certain promotional services undertaken by" them, and obtaining from sellers "special services or facilities" (*Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69).

The House committee report stated (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 3) that its "purpose * * * is to restore, so far as possible, equality of opportunity in business * * *." The committee quoted (*ibid.*) the following statement from the Federal Trade Commission's Final Report on the Chain-Store Investigation (S. Doc. No. 4, 74th Cong., 1st Sess., p. 24):

> As shown elsewhere, the ability of the chain store to obtain its goods at lower cost than inde-

> pendents and of large chains to obtain goods at lower cost than small chains is an outstanding feature of the growth and development of chain-store merchandising. These lower costs have frequently found expression in the form of special discounts, concessions, or collateral privileges which were not available to smaller purchasers. In seeking to buy at the lowest possible cost the chain does only what the independent does, but its size and bargaining power are such as to make its efforts yield far better results than those of the independent.

The committee further stated (H. Rep. No. 2287, p. 3):

> Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary.

Similarly, the committee emphasized (*id.*, p. 6) that its "guiding ideal" in drafting the bill was "the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production * * *."

The same theme of insuring equality of opportunity to all buyers, large and small alike, and to stamp out discriminatory practices which permit large buyers to gain a competitive advantage over small ones, occurs in the Senate committee report. It states (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 3) that the committee's "guiding ideal [was] the preservation of equal opportunity to all usefully employed in the service of distribution," and that "[t]he bill proposes to amend

section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them."

In the light of these "emanations of Congressional purpose manifested in the entire Act" (*Guessefeldt* v. *McGrath*, 342 U.S. 308, 312); we submit that the broad regulatory provisions of Section 2(c) should not be construed as covering only the particular brokerage evils that were specifically called to the attention of Congress. The following statement of Representative Utterback, chairman of the House conferees, although made with respect to Sections 2(d) and 2(e) is, we submit, equally applicable to Section 2(c):

> The existing evil at which this part of the bill is aimed is * * *. *The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the same purpose might be accomplished* * * *. [80 Cong. Rec. 9418, emphasis added.]

The facts in the instant case disclose a classic example of a large buyer obtaining a lower price, not given to other buyers, by exerting pressure on a seller. See our main brief, pp. 5-7, 24-25. Respondent, by accepting a reduction of its regular brokerage commission on this unusually large sale to the favored buyer, made it possible for the latter to obtain the precise kind of unfair competitive advantage that Congress sought to prohibit by the Robinson-Patman amendments. In so doing, respondent "grant[ed] * * * [an] allowance

or discount in lieu" of brokerage "to the other party" to the transaction, in violation of Section 2(c).

That section unqualifiedly prohibits "any person * * * pay[ing] or grant[ing] * * * anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof * * *." Neither the specific legislative history that respondent cites, nor the general "Congressional purpose manifested in the entire Act" (*Guessefeldt, supra*), supports respondent's narrow interpretation of these provisions[2]—an interpretation which, we reiterate, would have the effect of qualifying the broad phrase "any person" to mean "any seller," and the broad phrase "any allowance or discount in lieu" of brokerage to mean only an allowance or discount in lieu of secret or fictitious brokerage. We urge this Court to reject respondent's attempt to give this comprehensive language the "narrowest possible meaning" (*United States* v. *Bramblett*, 348 U.S. 503, 510), which is inconsistent with "the overall purpose of the Act" (*Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 163) to prohibit all preferen-

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[2] Respondent relies (Br. 28, 33) on the district court decision in *Robinson* v. *Stanley Home Products, Inc.* However, in recently affirming, the Court of Appeals for the First Circuit (*per* Judge Aldrich) specifically noted that it has "some doubts about the case of *Henry Broch & Co.* v. *Federal Trade Commission*, 7 Cir. * * *." *Robinson* v. *Stanley Home Products, Inc.* (C.A. 1), No. 5573, Dec. 10, 1959, slip op., note 1, p. 2.

tial practices by which large buyers could obtain discriminatory competitive advantages over small ones.[3]

Respectfully submitted,

J. Lee Rankin,
Solicitor General.

Daniel M. Friedman,
Assistant to the Solicitor General.

Daniel J. McCauley, Jr.,
General Counsel,
Federal Trade Commission.

December 1959

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[3] Respondent's contention (Br. 46-55) that the Commission's interpretation of Section 2(c) is "contrary to antitrust proscriptions" is fully answered at pages 25-28 of our main brief. In addition, we point out that price concessions to large buyers are not necessarily passed on by them to consumers. Representative Utterback noted this fact more than 20 years ago. Opponents of the Robinson-Patman Act, in contending that it would raise prices to consumers, acted on the assumption "that the discriminations in price granted to large mass buyers are actually passed on in lower prices to the consumer. * * * There is no evidence that this is true * * * there is nothing to indicate that the discriminations and allowances, such as this bill will forbid, ever find their way to any great extent into price reductions to the consumer." (80 Cong. Rec. 9415)

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v.

Henry Broch & Company, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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The attention of the Court is respectfully invited to two supervening significant developments since the filing of respondent's main brief on November 30, 1959: (1) The affirmance of *Robinson* v. *Stanley Home Products, Inc.*, now officially reported at 178 F. Supp. 230 (D. Mass. 1959), by the Court of Appeals for the First Circuit on December 10, 1959, 28 U.S.L. Week 2292, 1959 CCH Trade Cases par. 69,547; and (2) the publication by the Brookings Institution on December

14, 1959 of *The Price Discrimination Law, A Review of Experience* by Professor Corwin D. Edwards.

These authorities decisively refute the novel and central premise of the FTC's argument in this case that an open price reduction coupled with a reduced broker's fee is a *per se* illegal allowance "in lieu" of brokerage, and confirm that its application of Section 2(c) to fix and maintain brokerage commissions defeats the Congressional design to preserve the benefits of efficient distribution for the consumer through competitive pricing.

(1) The First Circuit's *Robinson* decision unanimously affirmed the District Court's ruling (see Resp. Br. pp. 28, 33) which rejected the contention that a seller's open price reduction made possible by the elimination of his broker's fee was an illegal allowance "in lieu" of brokerage to the buyer.* The opinion of the Court of Appeals, after a footnote reservation as to this case reported as pending on certiorari, went on to decide:

> "The matter covered by section 2(c) is unearned brokerage, per se, not discrimination. Federal Trade Commission v. Simplicity Pattern Co., 1959, 360 U.S. 55, 65, 27 LW 4389; Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 3 Cir., 1939, 106 F. 2d 667, cert. denied, 1940, 308 U.S. 625; rehearing denied, 309 U.S. 694. * * * There is no necessity for calling something brokerage that is not. If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act." 28 U.S.L. Week at 2293.

* In that case, as here, the price reduction was "open" in the conventional sense as heretofore understood by the FTC and Congress, *i.e.*, not concealed or camouflaged in the business records of the parties as a brokerage fee to the buyer or his front (see Resp. Br. p. 21).

The holding of the Court of Appeals not only corroborates respondent's legal position in light of this Court's *Simplicity Pattern* opinion (Resp. Br. pp. 19-34), but continues intact the two decades of judicial precedent establishing that a lawful price variation cannot be treated as an illegal brokerage payment—particularly where, as here also, there is no indication "that the parties so described it or that it was designed to reimburse the buyer for some brokerage or servicing obligation ostensibly incurred or even that it was the mathematical equivalent of what the manufacturer formerly paid to the broker." *Ibid.*

(2) The Brookings Institution study, a 700-page survey by the FTC's former Chief Economist Professor Corwin D. Edwards, significantly finds that the FTC's Brokerage Clause enforcement, in which "the principal organization of brokers in the food field was actively interested," has served "to encourage certain inefficiencies in the distribution of food" (pp. 71-72, 150-151). The study quotes and confirms the Report of the Attorney General's National Committee to Study the Antitrust Laws that the FTC's application of Section 2(c) "clogs competition in the channels of distribution, and exacts tribute from the consumer for the benefit of a special business class." *Ibid.*

The Brookings Institution study also deflates the FTC's claims, now joined by a group of organized retailers, that the instant application of the Brokerage Clause, notwithstanding its novelty and conflict with antitrust objectives, is nevertheless justified by the "overall purpose" of the Robinson-Patman law against discrimination in favor of "large buyers" (Reply Br. pp. 6-7). According to the Brookings Institution findings, "the brokerage provision has almost no relevance

to a policy toward price discrimination" (p. 644). Indeed,

> "The effect of the brokerage cases on the relative well-being of corporate chains and small independent distributors is uncertain, with considerable probability, however, that on balance the independents have been hurt rather than helped. * * * The difficulties that the brokerage provision presents to independents appear to be more enduring, more general, and less readily avoided than those that it presents to the corporate chains" (pp. 151-152).

Finally, the study's recommendation that any harmful discriminatory practice by "powerful buyers" should be checked "directly through proceedings against the buyers who engage in it" (pp. 642-643) highlights the anomaly of the FTC's position here—of pursuing a small broker under an inapplicable provision, while denouncing the "large buyer" but avoiding the provisions pertaining to discrimination on the part of sellers and buyers.

* * *

These supervening developments confirm that the Federal Trade Commission's theory of this case has strayed equally far from the letter and the spirit of the antitrust laws, and hence can muster the concurrence of some organized merchants but not of the

American consumer or the Antitrust Division of the Department of Justice of the United States.*

Respectfully submitted,

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* Cf. the Justice Department's Sherman Act complaint against a retail grocers' association announced December 31, 1959, designed to eliminate "restraints in the sale of groceries" in order to ensure "more vigorous competition in one of the most essential of all cost-of-living items, namely food," and "to permit consumers to purchase groceries in a freely competitive retail market." *United States* v. *San Diego Grocers Ass'n, Inc.*, Civ. No. 2347 (S.D. Calif. 1959).